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In the Supreme Court of the United States

Samson Dubria,
Petitioner,
v.
G.A. Smith, Warden,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW (Rule 14.1(a))

1. IS IT A DENIAL OF DUE PROCESS OF LAW TO PERMIT POLICE INVESTIGATORS TO INFORM A JURY THAT THERE IS UNSTATED EVIDENCE AGAINST PETITIONER, THAT THE EVIDENCE OF GUILT IS CONCLUSIVE, THAT THE OFFICERS DISBELIEVE PETITIONER'S EXCULPATORY STATEMENTS, AND THAT THE JUDGE AND JURY WILL BELIEVE HE IS LYING WHEN HE PROTESTS HIS INNOCENCE IN COURT?

2. IS IT INEFFECTIVE ASSISTANCE OF COUNSEL TO NOT OBJECT TO THE PROSECUTOR'S ARGUMENT TO THE JURY THAT HE KNEW OF OTHER UNSTATED DAMNING EVIDENCE AGAINST PETITIONER AND CLAIMING THAT DEFENSE COUNSEL KNEW HIS CLIENT WAS GUILTY?

3. WHEN A SUSPECT IS ALONE AT THE PROSECUTOR'S OFFICE AND UNWARNED OF HIS CONSTITUTIONAL RIGHTS TO COUNSEL AND SILENCE, AND IS CONFRONTED WITH ACCUSATORY INTERROGATION ACCUSING HIM OF MURDER, IS IT OBJECTIVELY REASONABLE FOR THE SUSPECT TO BELIEVE HE IS FREE TO GO AT ANYTIME SO THAT NO ADMONITIONS PER MIRANDA v. ARIZONA, 384 U.S. 436 (1966), NEED BE GIVEN?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Samson Dubria respectfully prays that a writ of certiorari issue to review the judgment of the Ninth Circuit Court of Appeals, sitting *en banc*, and entered on September 11, 2000.

I. OPINION BELOW (Rule 14.1(d))

The opinion of the Ninth Circuit Court of Appeal, sitting *en banc*, overturned a previous panel ruling granting petitioner's pre-AEDPA petition for writ of habeas corpus challenging his California conviction for first degree felony murder, rape by use of chloroform, and administering the drug to commit a felony. *See* Dubria v. Smith, 197 F.3d 390 (9th Cir. 1999 (original panel opinion). The *en banc* decision denying relief, with one dissent, is published in the official reporter at 224 F.3d 995. The *en banc* opinion is attached and cited as the "Appendix" to this petition.

II. JURISDICTIONAL STATEMENT (Rule 14.1(e))

Petitioner's conviction was affirmed by the California Court of Appeal in People v. Dubria, D018852, on July 18, 1995, an unpublished opinion. A petition for review was denied on October 19, 1995, in the California Supreme Court, with one justice voting to grant review. Thereafter, petitioner filed a petition for *certiorari* in this Court, No. 95-1029, which was denied on February 20, 1996. Petitioner filed a petition for writ of habeas corpus under Title 28 U.S.C. 2254 which was denied by the district court on February 24, 1998. He timely appealed to the court of appeals which initially reversed his conviction for due process violations by a 2-1 vote. Dubria v. Smith, 197 F.3d 390 (9th Cir. 1999.) On the State's request, a rehearing *en banc* was requested, granted, and on September 11, 2000, the *en banc*

court majority, with one dissent, affirmed the ruling of the district court denying petitioner's habeas petition. The jurisdiction of this court is based upon 28 U.S.C. 1257(a).

III. CONSTITUTIONAL PROVISIONS (Rule 14.1(f))

United States Constitution, Fifth Amendment, provides in part that : "... no person shall be compelled in any criminal case to be a witness against himself." It also guarantees that no person be denied due process of law.

United States Constitution, Sixth Amendment, guarantees the effective assistance of defense counsel.

United States Constitution, Fourteenth Amendment, guarantees that these constitutional rights shall be respected in the various states.

IV. STATEMENT OF THE CASE (Rule 14.1(g))

On August 15, 1991, petitioner, a twenty-eight-year old medical doctor with no criminal history, was on vacation in California with his friend, the decedent, Jennifer Klapper, age twenty. They had met and dated while he was serving his internship at a hospital in Cincinnati, Ohio, where she also worked. Petitioner had just begun his residency at the University of Medicine and Dentistry of New Jersey, when he invited her to join him for a week vacation in Southern California. She accepted.

They spent much of the week together vacationing and visiting tourist attractions. On August 15, 1991, at about 11:30 p.m., they went to a motel in Carlsbad, California, to spend the night. They had sexual relations which the State claimed was rape. At 3:07 a.m., petitioner called "911" to report that Ms. Klapper was in respiratory arrest. After CPR was administered

in the motel room by both petitioner and paramedics, she was rushed to the hospital, but it was too late. She was pronounced dead at 3:52 a.m.

The cause of death was said to be chloroform ingestion. Petitioner denied any knowledge of such ingestion. The theory of felony murder was that petitioner used chloroform to render Ms. Klapper unconscious so that he could have sex with her and that she died as a result of her reaction to the drug. As the prosecutor told the jury in opening statement:

> Our theory is not that he intended to kill her. [¶]... And even though he didn't intend to kill her, he may not have intended to kill her, under California law, if a person is killed in the commission of rape, even if it's accidental, even if it's unintentional, that's first degree murder. State Trial Reporter's Transcript (RT) 681.

No trace of chloroform was found on Ms. Klapper's clothes, the bedding, or anywhere else except in her body. The rape theory was central to the conviction in this case because once found, it made inevitable the murder conviction, it's degree (first), as well as the rape special circumstance which led to a life without parole sentence.

The jury convicted on evidence which was grounded primarily in a toxicologist's report finding traces of chloroform. Petitioner produced evidence at his trial and on collateral attack of the judgment in state and federal court contesting reliability of this toxicological evidence, which is not at issue here, but would weigh in any prejudice calculus of the constitutional errors

described below.

A key piece of evidence was a taped "statement" of petitioner which turned out to be the investigating detective's soliloquy on why he believed petitioner guilty complete with references to "evidence" never adduced at trial and other inflammatory references. A transcript of this tape recording was provided the jury over petitioner's objection.

On April 1, 1992, the District Attorney for San Diego County filed an information charging petitioner with one count of murder in the death of Jennifer Klapper, pursuant to California Penal Code section 187, rape by administration of drugs, pursuant to California Penal Code section 261a(3), and administering an anesthetic to aid in a felony, pursuant to California Penal Code section 222. CT 1-2.[1] Additionally, a rape murder special circumstance was alleged. Ibid.[2]

During the trial, the State was permitted to play the tape for the jury of the interview of petitioner by the case agent, Detective Detar and another officer. Petitioner objected that much of the tape was composed of Detar's lengthy statements of fact many of which were highly prejudicial, inflammatory and

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[1] "CT" stands for state court clerk's record. "RT" stands for the references to the state trial transcript. "ER" stands for the excerpt of record filed in the Ninth Circuit Court of Appeals.

[2] There are no questions of exhaustion of remedies in this habeas. Petitioner raised these federal constitutional issues in the state court and in the federal court in a timely manner and the rulings of the Court of Appeal are on the merits of the issues.

false. The trial court responded by saying it would give the jury limiting instructions. Later, the jury was given a transcript of the tape as an exhibit, again over petitioner's objection.

A few examples from the tape included statements that others had told the police of petitioner's guilt, that the scientific tests had all been completed and the evidence of guilt was conclusive, that the officer's believed petitioner guilty, and that the judge and jury would find his protests of innocence to be lies.

To further the allusion to "other" evidence, the prosecutor improperly argued to the jury at the end of the case that he could, if he had wanted, inform the jurors of other bad things about petitioner, but that he wouldn't because he knew they could think of them without him saying so. Further, he stated that petitioner (a medical doctor with no criminal record and with no history of acting out in an antisocial manner) was "a piece of garbage" whose own attorney knew he was guilty. The jury then convicted of all charges and petitioner was sentenced to life without parole.

V. REASONS FOR GRANTING THE WRIT

Pursuant to Supreme Court Rule 10 and 14(h), as amplified in the following arguments, compelling reasons warrant review of the three questions presented, particularly as to issue number 1, the admission of a police officer's recorded "soliloquy of guilt." Until now, no court precedent in the land permitted the introduction of such "evidence." The Ninth Circuit *en banc* opinion's finding such evidence "unremarkable" and harmless to petitioner's constitutional fair trial rights cannot withstand analysis. If followed by the trial courts, this precedent will constitute a serious threat to the due process rights of all defendant's on trial.

ARGUMENT

1. IT IS A DENIAL OF DUE PROCESS OF LAW TO PERMIT THE POLICE TO PLAY A TAPE AND TRANSCRIPT TO THE JURY TO FALSELY INFORM IT THAT THERE IS UNSTATED EVIDENCE AGAINST PETITIONER, THAT THE STATE'S EVIDENCE IS CONCLUSIVE, THAT THE POLICE PERSONALLY BELIEVE THE SUSPECT IS OBVIOUSLY GUILTY, AND THAT THE JUDGE AND JURY WILL BELIEVE HE IS LYING WHEN HE PROTESTS HIS INNOCENCE TO THEM.

The Court of Appeals *en banc* majority found nothing improper in giving the jury the tape, the transcript and the opportunity to read and listen to what amounted to pages of Officer Detar stating his lengthy and inflammatory soliloquy of guilt. Appendix, 10-13. The original panel majority opinion, however, found it a denial of due process of law. *See en banc* dissenting opinion, Appendix, 17-27, finding the comments presumptively prejudicial. Id. at 20, *citing* U.S. v. Harber, 53 F.3d 236, 238 (9th Cir. 1995).

As the original panel opinion stated, the comments of the investigating officer on the defendant's guilt were presumptively prejudicial and inadmissible, and when examined with the related prosecution misconduct in final argument, were cumulatively prejudicial to petitioner's fair trial rights. Dubria v. Smith, *supra* at 197 F.3d 400.

There could hardly be a more pernicious ruling to the concept of a fair trial than to allow the State to introduce as

evidence a police officer's lengthy, repeated and prejudicial statements to a suspect, call it part of the interrogation, and sustain conviction in close cases like this. This is not due process. In fact, it offends society's fundamental "sense of fair play and decency" and denies due process. Rochin v. California, 342 U.S. 165, 173 (1952). An American courtroom will not permit admission of such police-manufactured trial "evidence."

Just as in Alcorta v. Texas, 355 U.S. 28 (1957), where this court found a violation of due process when the State had presented a "false impression" of a key prosecution witness's credibility, here the State was permitted to do far more – among other things, to tell the jury, through the case agent's taped statements and the transcript given the jury, that other "unstated" evidence existed, that other people had told the police petitioner killed the deceased, and that the scientific evidence was "conclusive." This was untrue.

What the *en banc* majority overlooks in condoning this is that while interrogating police officers may be free to make long narrative statements to suspects to try to prod confessions and in the process convey false information, inflammatory notions about judge and jury hostility toward a suspect's protests of innocence, and repeatedly state beliefs in the suspect's "conclusive" guilt, those statements have no place before the jury. Police statements to suspects do not gain evidentiary admission at trial simply because they were made as a preface to interrogating a suspect. As petitioner's counsel stated when he broadly objected at trial to these statements (Appendix, 9), they were not petitioner's statements and should not have been admitted.

That is the issue in this case: may such highly prejudicial,

inflammatory and irrelevant statements be introduced to give context to an interrogation? The answer is clearly no and the due process right to a fair jury trial is grossly subverted by permitting it. Just as allowing the jury to hear a prosecutor's personal opinion on the defendant's guilt presents the danger that the jury will believe other evidence supports charges (U.S. v. Young, 470 U.S. 1, 18-19 (1985)), the same is no less true when the investigating officers are saying it to the jury and the prosecutor is presenting it as evidence.

It is unfortunate and wrong for the *en banc* majority to adopt the State appellate court characterization that these statements by the officers "were generally unremarkable" and that the jury would understand that this was merely the "police position." These unsubstantiated assumptions as to how a jury would characterize the statements are facially unreasonable, and are based on the false foundation that "the officers' comments... suggested no more than what the People proposed to prove at trial." Appendix, 10, n. 2 (quoting state court of appeal opinion.)

In no way did any evidence come in at trial from witnesses stating petitioner was guilty, that the scientific evidence was "conclusive" in showing guilt, nor were opinions elicited that petitioner was mendacious in his testimony. All of this would have been patently inadmissible if the State had actually tried to put the evidence on directly. Indeed, this was part of the reason the initial panel opinion overturned the petitioner's conviction as a violation of the due process right to a fair trial. 197 F.3d 390, 401.

It can hardly be said that the objectionable comments by the Detective on tape and transcript were relevant to petitioner's

answers because the objectionable parts were simply lengthy statements of fact (some false and highly prejudicial) and irrelevant opinions of guilt expressed by the officers. The majority's reliance on the trial court's cautionary instruction to the jury by the court is misplaced.[3] First, the majority is wrong in labeling the officer's statements as "mere questions and not as evidence." Appendix, 13. The statements were emphatic statements of "conclusive" scientific proof of guilt compounded by repeated assertions of personal belief in guilt and predictions that the judge and jury would hold the same view.

Such an off-point cautionary instructions could hardly be expected to cause the jurors to disregard adamant, repeated statements such as the officers' references to unnamed (nonexistent) persons who said petitioner was responsible for the homicide, or the "conclusive" evidence of guilt they held, or their repeatedly expressed beliefs in petitioner's conclusively shown guilt, or that the jurors and judge would disbelieve petitioner at trial. Even if the cautionary jury instructions were on the mark, as this Court has said, "there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great,

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[3] As the original panel concluded: "It is true that the jury was twice given a cautionary instruction that Detar's questions should not be considered for their truth, but only to place Dubria's answers in context. [n10 omitted] Still, given the extremely prejudicial nature of Detar's statements, as well as the fact that a transcript of the interview was also later given to the jury, [citations omitted]... we cannot conclude that the instructions cured the impact of Detar's inflammatory statements on the fairness of Dubria's trial." 197 F.3d 401.

and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." Bruton v. U.S., 391 U.S. 123, 135 (1968); *also cited in* Gray v. Maryland (1998) 523 U.S. 185, 190; *see also* Berger v. U.S., 295 U.S. 78, 85 (1935) (""It is impossible to say that the evil influence upon the jury of these acts of misconduct was removed by such mild judicial action as was taken.")

Here, the fact that the statements came from the investigating officers made the statements more prejudicial given jury deference to the police and the status of these officers in summing up their investigation to petitioner. *See* Turner v. Louisiana, 379 U.S. 466, 474 (1965) (the fact that they were deputy sheriffs "made the association even more prejudicial"). This tape and transcript were extremely prejudicial not only because of the status of the police but also because it is an invasion of the jury's responsibility to determine the facts and witness credibility. U.S. v. Binder, 769 F.2d 595, 602 (9th Cir. 1985).

Indeed, the very case the *en banc* majority rely upon to suggest that cautionary instructions mitigate harm from prejudicial evidence, U.S. v. Merino-Balderrama, 146 F.3d 758, 764 (9th Cir. 1998), reversed the conviction because the limiting instruction could *not* dispel the prejudice from the improperly admitted evidence. *See* Appendix, 12.

Further, the attempt to distinguish Bruton from this case does not hold water. The majority state that petitioner could have examined Detar on the stand about his irrelevant and inflammatory taped statements he made to petitioner in his soliloquy of guilt during the interview, as if that option were a

cure to the prejudice from admission of such irrelevant and inflammatory material. That is no remedy at all given that it would only provide a platform for the officer to further a self-serving rationale for his opinions. Also, like Bruton, this remedy in no way allowed petitioner to confront the *non-existent* unnamed people that Detar falsely stated had concluded petitioner was responsible for the death of the victim.

State and federal courts have properly reversed convictions simply for the erroneous introduction of evidence of officers testifying to their belief in the guilt of a defendant or the veracity of a complaining witness. *See e.g.*, U.S. v. Harber, 53 F.3d 236 (9th Cir. 1995) (reversal required where case agent's report containing a summary of his investigation and his opinion that the suspects were guilty mistakenly given the jurors); Maurer v. Dept. of Corrections, 32 F.3d 1286, 1287 (8th Cir. 1994) (denial of due process of law to admit testimony from witnesses, including two police officers, that the victim was "sincere" in her claim of rape; held to be reversible under Brecht v. Abrahamson, 507 U.S. 619 (1993); Cooper v. Sowders, 837 F.2d 284, 287-288 (6th Cir. 1988) (officer improperly allowed to testify as expert on credibility which helped produce a "fundamentally unfair" trial); People v. Torres, 33 Cal.App.4th 37 [39 Cal.Rptr.2d 103] (1995) (peace officer's opinion that defendant committed the crimes did not assist jury and was not beyond common juror experience); People v. Sergill, 138 Cal.App.3d 34, 39-40 [187 Cal. Rptr. 497] (1982) (reversible error for officer to testify that child victim was telling the truth); People v. Brown, 116 Cal.App.3d 820, 829-830 [172 Cal.Rptr.221] (1981) (officer's testimony that defendant acted as a runner of drugs, and thus was as guilty as a seller, was

reversible error).

This court, in U.S. v. Scheffer, 523 U.S. 303, 313 (1998), upheld a statute which banned polygraph evidence at trial. In so holding, the court observed that the fundamental premise of our criminal trial system is that "the jury is the lie detector," and that the determination of the weight and credibility of witness testimony belongs to it. So too here. By their very nature, such police statements as are at issue here undoubtedly diminish the jury's role in making credibility determinations because of the excessive weight awarded the opinions of the investigating police officers.[4]

This Court has not retreated from the constitutional minimum that evidence be relevant. "An important element of a fair trial is that a jury consider only relevant and competent evidence bearing on the issues of guilt or innocence." Bruton v. U.S., 391 U.S. 123, 131, fn. 6 (1968). Where the introduction of irrelevant evidence infects the trial with unfairness so as to deny due process, the right to a new trial is warranted. *See* Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974); McKinney v. Rees,

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[4] Many lower federal court's have held that expert witnesses cannot testify about witness credibility because to do so usurps the exclusive function of the jury to weigh evidence and determine credibility. *See, e.g.*, U.S. v. Scop, 846 F.2d 135, 142 (2nd Cir. 1988); U.S. v. Ward, 169 F.2d 460, 462 (3rd Cir. 1948); U.S. v. Speer, 30 F.3d 605, 610 (5th Cir. 1994); U.S. v. Lipscomb, 14 F.3d 1236, 1239 (7th Cir. 1994); U.S. v. Samara, 643 F.2d 701, 705 (10th Cir. 1981)("an expert may not go so far as to usurp the exclusive function of the jury to weigh the evidence and determine credibility".)

993 F.2d 1378 (9th Cir. 1993), *cert. denied* 126 L.Ed.2d 586 (admission of irrelevant, prejudicial prior act evidence denies due process of law).

Such evidence undermines a defendant's right to testify without unfair state impediments in that it allows the State to cruelly characterize the defendant's protests of innocence as perjury in its case-in-chief through police testimony before the defendant testifies.[5] Neither the courts below nor the respondent State of California cited a single precedent from any jurisdiction which holds that this evidence is properly admissible over objection. The ruling petitioner seeks is not one on which reasonable judicial minds can debate; it is basic due process. Due process gives a defendant a substantive right to a fair trial which includes the right to testify without the State putting on its agents

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[5] This court has been mindful to protect a defendant's right to testify from improper State impediments. *See* Brooks v. Tennessee, 406 U.S. 605 (1972), finding unconstitutional a state rule that provided that if a criminal defendant was to testify he or she had to do so before any other defense witness testified. In Griffin v. California, 380 U.S. 609, 614 (1965), it was held that comment on a defendant's failure to testify "is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly." The Court found that "cutting down" the privilege, regardless of compulsion, constituted a Fifth Amendment violation. *See also* Rock v. Arkansas, 483 U.S. 44, 62 (1987)(excluding all post-hypnosis testimony by a defendant infringes on defendant's right to testify); Ferguson v. Georgia, 365 U.S. 570, 596 (1961) (the right of a defendant to testify is fundamental and a statute which prevents counsel from asking questions on direct violates due process).

to persuade the jury in advance that the defendant's version is a lie and to falsely state that other evidence never presented the jury is "out there."

California agents already overstep their constitutional obligations by interrogating "outside" Miranda v. Arizona, 384 U.S. 436, 448 (1966), that is, they do not give the warnings when they should confident that any admissions will still be useful to the investigation and to impeach any suspect who testifies. *See* issue 3, *infra*, pp. 21-22. This additional tactic of loading the interrogation questioning with prejudicial material cannot be constitutionally condoned. Certiorari should thus be granted to insure that police-suspect interrogations are not, as in this case, used as pretextual opportunities to introduce extremely prejudicial, false, and otherwise inadmissible material to the jury under the makeweight rationale that the matter is harmless because the jury will know this is merely the "police position."

2. IT IS INEFFECTIVE ASSISTANCE OF DEFENSE COUNSEL UNDER THE SIXTH AMENDMENT TO PERMIT A PROSECUTOR TO INFORM THE JURY HE KNOWS OF OTHER DAMNING UNSTATED EVIDENCE AGAINST THE PETITIONER AND THAT THE DEFENSE ATTORNEY KNOWS HIS CLIENT IS GUILTY.

This issue involves prosecutorial comments to the jury that "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly v. DeChristoforo, 416 U.S. 637 (1974). Further, defense counsel was ineffective in failing to protect his client by objecting to the statements. The

majority opinion finds the following prosecutorial jury argument as proper and that defense counsel was effective in not objecting to it:

> But to get up here and get on the stand and look at you people and tell you that story that he told you in front of the family, **this piece of garbage,** making up every little bit of it, he's the biggest liar you've ever encountered. **He's a lot worse than that. I'm not going to tell you. You can imagine some of the things I would tell you what he really is. I'm not going to tell, because you know. You know in your hearts what else.** RT 2224; ER 321. *Emphasis added.*

Further, in responding to the defense statement that the jury would receive a lesser included instruction on manslaughter and its possible applicability to the facts, the prosecutor in rebuttal told the jury: "The reason he talked about involuntary manslaughter is because he knows that you know that the defendant is guilty." RT 2280; ER 322. (The majority opinion does not address this last comment in its opinion.)

Under the standard of Strickland v. Washington, 466 U.S. 668 (1984), waiving an objection based on mistake, inadvertence or negligence can be ineffective assistance of counsel under the Sixth Amendment. Kimmelman v. Morrison, 477 U.S. 365 (1986) (failure to make a motion for discovery which would have led to a motion to suppress illegally seized evidence constitutes ineffectiveness).

Here, the initial inquiry is whether there was misconduct in the prosecutor's statements. The opinion labels the "garbage" comment as a mere reference to petitioner's testimony.

Appendix, 16. This is not so as a reading of the record demonstrates. It also characterizes the reference to "other" damning but unstated evidence about petitioner as ambiguous. Appendix, 16-17. This too is not a reasonable reading of the passage. A reasonable jury would hear these statements about petitioner as attacking him for having the audacity to pronounce his innocence on the stand before the jury and the deceased's family.

Analysis of the prosecutor's words shows exactly to whom he referred: "But [for him] to get up here and [for him to] get on the stand and [for him to] look at you people and [for him to] tell you that story that he told you in front of the [deceased's] family, **this piece of garbage,** [his] making up every little bit of it, he's the biggest liar you've ever encountered."

Every word prior to and after the "garbage" epithet castigates petitioner himself for taking the stand and testifying in front of the jury and deceased's family. This meaning is conclusively shown by the very next phrase in which the prosecutor states, "**he's** a lot worse than that" [*i.e.*, worse than the biggest liar]. It is petitioner who is referred to as worse than garbage and a liar, not his testimony. The prosecutor then informs the jury that petitioner is worse than this, and he has information he won't share with them explicitly as to what he knows, but they can imagine what he would tell them.

As with jury instructions, the question is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way" that violates the constitution. *E.g.*, Estelle v. McGuire, 502 U.S. 62, 72 (1991). This did. The only reasonable meaning of the reference to other unstated damning

evidence (and evidently, too horrible to even articulate) was, as the original panel majority found, that the prosecutor knew of other damning matter that he would not share with the jurors, a theme the Detar tape and transcript also contained when Detar stated to petitioner that there was other unstated evidence showing his guilt. Both the prosecutor's and the officer's statements were false. *See* Appendix, 22, dissenting opinion: "this other 'evidence' was not introduced at trial because it did not exist." There was no other evidence, but the jury was given the exact opposite message by the police and the prosecutor, officials whom jurors would normally believe to be knowledgeable and trustworthy and who would not mislead them – as they most certainly did. *See* Berger v. U.S. 295 U.S. 78 (1935) (references to personal knowledge of facts for which there is no evidence is misconduct).

The majority opinion's conclusion about the "other" unstated matters was that the prosecutor's reference was probably, albeit ambiguously, about petitioner having committed a "rape murder" – the offense for which he was charged and on trial. Appendix, 16-17. This again cannot withstand analysis. Having made the formal rape-murder charge and then adduced weeks of evidence and given argument on that issue, it is unreasonable to believe that at the end of the case, the prosecutor suddenly became shy about stating the charge against petitioner. The record says otherwise: In his opening statement, the prosecutor stated he would prove petitioner committed rape-felony murder. RT 681. In final argument, he argued rape felony-murder (RT 2206), and that, "This is a date rape situation." RT 2286. It makes no sense to construct a harmless

meaning out of this context when the context so clearly contradicts it. The prosecutor did not suddenly become shy about stating rape-murder as the charge or the judgment he sought. This was a reference to other unstated matter, which did not exist, to cause the jury to believe there were other crimes petitioner committed.

There was yet another unwarranted and highly prejudicial prosecutorial statement. The prosecutor told the jury that the fact that the defense attorney briefly mentioned in his defense argument the availability of a lesser included offense instructions meant that he knew his client was guilty: "The reason he talked about involuntary manslaughter is because he knows that you know that the defendant is guilty." RT 2280; ER 322.

The defense attorney's talking to the jury about lesser instructions -- petitioner had objected lessers being given during the instruction conference (RT 2086) -- cannot be turned into a prosecutor's weapon of argument that the defense attorney "knows" his client is guilty. *E.g.*, People v. Thompson, 753 P.2d 37, 53 fn. 19 (Cal. 1988) (collecting cases); Bruno v. Rushen, 721 F.2d 1193 (9th Cir. 1983) (prosecutor's baseless condemnation of the defense as fabricated held prejudicial.) This statement told the jury the defense of innocence was but a sham because even the defense attorney knew petitioner was guilty.

These prejudicial prosecution misstatements warranted an objection by a reasonable attorney. Kimmelman v. Morrison, *supra (*failure to file appropriate discovery motion held ineffective); Sager v. Maass, 84 F.3d 1212 (9th Cir. 1996), *affirming* for the reasons stated in the district court opinion at 907 F.Supp. 1412, 1420 (D.Or. 1995)(a competent defense

attorney would object to irrelevant, inflammatory references concerning his client on a police tape recording.) The prejudice from not objecting is obvious: this jury was told by the prosecutor in argument there was unstated other evidence against petitioner and that petitioner's own attorney believed him guilty. Combined with the tape and transcript, which also alluded to other unstated (but nonexistent) evidence, the petitioner was actually prejudiced.

In Strickland v. Washington, 466 U.S. 668, 698 (1984), the Court described an ineffective assistance of counsel claim as an "attack on the fundamental fairness" of the trial. The Court stated that "fundamental fairness is the central concern of the writ of habeas corpus." Id. *See also* Mak v. Blodgett, 970 F.2d 614, 622 (9th Cir. 1992)(ineffective assistance plus other errors in penalty phase -- the erroneous exclusion of mitigating evidence and instructional error -- warranted habeas relief.)

In this case, the evidence of guilt was "far from overwhelming." Dissenting *en banc* opinion, Appendix, 24. The cumulative prejudicial effect of the constitutional violations cannot be denied. *See* Berger v. U.S. *supra* at 79. Certiorari should be granted to insure the Sixth Amendment right to counsel includes counsel who reacts to prejudicial misconduct by the State by objecting.

3. A SUSPECT IS IN CUSTODY FOR MIRANDA ADMONITION PURPOSES WHEN HE IS DUPED INTO AGREEING TO BE TAKEN BY THE POLICE TO PROSECUTION OFFICES MILES FROM HIS HOME OSTENSIBLY FOR A CHAT AND UPDATE ON CASE DEVELOPMENTS, AND THEN IS CONFRONTED WITH ACCUSATIONS OF MURDER AND NOTIFIED THAT FUTURE COURT PROCEEDINGS WILL OCCUR AND THAT HE HAS TO "GET SOMETHING GOING" FOR HIMSELF.

This issue relates to the introduction of the tape recorded statements of the interrogating officers during an interview of petitioner, as set forth in reason one for the grant of *certiorari.* The officers had made an unannounced visit to petitioner's home, met him at his car as he was about to drive to the hospital where he was a new resident, and drove him to a prosecutor's office for a "chat" about the investigation. This issue turns on the Miranda v. Arizona, 384 U.S. 436, 448 (1966), definition of "custody." The Court of Appeals approved the federal district court ruling on this issue – rejecting that there was any custody and therefore that no Miranda warnings were required -- and did so merely by stating it was "without merit." Appendix, 17.

Simply put, no reasonable person, unwarned of his constitutional rights, would believe himself free to leave the prosecution office after: a) being duped into agreeing to be taken by the police to prosecution offices miles from his home ostensibly for a "chat" in which he would be updated on case developments; b) being told while at the prosecutor's office that he took a woman's life by using chloroform in order to have sex with her; c) being told there was no other explanation for the

death other than that he did it, d) being told that other unidentified people said he was responsible, e) being told that all the scientific tests were performed and that the evidence was conclusive, and f) being told that at his future court proceedings the judge and jury would not believe his claims of innocence; thus, he needed to "get something good going" because his protestations of innocence to the police were not doing that. See Appendix, 21, dissenting opinion quoting from taped transcript played and provided jury in transcript form during deliberations.

The state and federal courts in this case ruled that yes, the reasonable suspect would feel free to walk out of the prosecutor's office under these circumstances. But it is patently and objectively reasonable that a suspect in this context would believe he is ***not*** free to go, and all statements taken before a Miranda rights admonition would be taken in violation of the U.S. Constitution's Fifth Amendment guarantee. Dickerson v. U.S., __ U.S. __, 120 S. Ct. 2326 (2000). As noted, the federal district court and the court of appeal disagreed. Appendix, 17.

This issue is a recurring one in California because for years law enforcement has been trained that taking statements "outside" Miranda was perfectly legal. Toying with the concept of "custody" has been one means of furthering this tactic. By misusing this court's decision in Harris v. New York, 401 U.S. 222 (1971) (holding that a good faith Miranda-violation still permits the suspect's statements to be used to impeach the defendant's trial testimony), the police put themselves in a win-win situation by ignoring Miranda's requirements no matter what the court's rule later. If Miranda is deemed violated and suppression ordered, then at least the defendant will be kept off

the stand or suffer impeachment with any Miranda-violative statements. If the tactic produces no suppression ruling, so much the better. *See, e.g,* People v. Peevy,17 Cal.4th 1184 (1998) (intentional Miranda violation warrants only suppression during case-in-chief and impeachment still permitted); People v. Bey, 21 Cal.App.4th 1623 (1993); People v. Baker, 220 Cal.App.3d 574, 576 (1990). *See also* California Attorneys for Criminal Justice v. Butts, 195 F.3d 1039 (9th Cir. 1999), *cert denied sub nom.* Butts v. McNally, 147 L. Ed. 2d 983 (holding such violations to be also violations of Title 42 U.S.C. 1983.)

Apart from this official compliance problem, the specific issue of "custody" is involved in this case and, of course, has been the subject of opinions in this Court. *See* Stansbury v. California, 511 U.S. 318, 324 (1994) (officers subjective beliefs not relevant to custody issue unless communicated); Thompson v. Keohane, 516 U.S. 99 (1995) (*de novo* federal habeas corpus required of the custody issue); Oregon v. Mathiason, 429 U.S. 492, 493-494 (1977) (no custody where officer called parolee at his home and asked to meet him at a state patrol office two blocks from the parolee's home, and there told parolee he had committed a burglary prompting a confession.)

Petitioner was the suspect in the case when officers traveled from California to New Jersey to interrogate him and conduct searches of his apartment, car and work locker. He was going to be formally arrested, but the detective in charge, Detar, did not make an arrest on October 23, 1991, the date of the interrogation, because informing the petitioner of his rights might well have cost him a potentially useful damning statement. Ironically, petitioner made no incriminating statements. The

State nevertheless introduced the tape recording for the ostensible purpose of showing that petitioner had no explanation for how his friend died -- a statement he had given months earlier on the date of her death. RT 740, 761. He also testified at the trial and denied any involvement in her death or why she expired. RT 1687, 1779-80.

The clear prejudice from the introduction of the tape recorded statement was *the officer's* long narratives of false information (*e.g.*, other unstated people said petitioner was responsible, the evidence was conclusive, all scientific tests had been performed). He continually added his own repeated opinion of petitioner's guilt and said that the trial judge and jury would believe petitioner to be a liar.

No reasonable person in petitioner's position would feel free to leave the prosecutor's office after these statements. Petitioner, a medical doctor, had been surprised by the appearance of police from California in front of his apartment in New Jersey at 7:22 a.m. that morning as he was about to go to the hospital to perform his medical duties; he was asked to go downtown for a "chat" where the officers would "...tell [him]... everything that's happened and we'll get it all taken care" of (CT 75), and then was driven miles away by the police to a prosecutor's office. He was assured that he was "an important witness." CT 86. At the prosecutor's office, he was informed: "If I told you someone said you were responsible for her death, what would you say?" CT 99. "And a, pretty much, we've determined that you are responsible for her death.... [¶] There's no question. The evidence is conclusive...." CT 100.

Then the inquisitors stated, "Now, we need to get

something going for you." CT 101. What would this information tell a reasonable human being who has just been surprised by an officer's accusation that he committed an unlawful homicide and would face court proceedings in which a judge and jury would disbelieve his claim of innocence? The answer should have been self-evident to the court's below.

The refrain of the State inquisitors continued that petitioner needed to "get something going" for himself. CT 101-102: ("So now this is the opportunity for you to come clean, for you to do something good for you to say ... [sound of sigh], guys I need to tell you something.") Why? Because the officer tells him: "you caused her death." CT 102.

After being tricked to come "downtown" for a chat concerning an information update, and then, once in the prosecutor's office, accused of murder and that he needed to "get something going" because the police did not believe his exculpatory statements, only the most brazen would feel free to leave. The definition of custody is uncomplicated: a reasonable belief in official restraint such that one is not free to leave. Even the most daring legal interpreter of this court's Miranda-custody jurisprudence would be surprised to learn that on the facts of this interrogation, a reasonable person would feel free to leave especially after the officers started posing questions along the lines of "what are the judge and jury going to say?" CT 103-104, 107. Obviously, petitioner was going to be formally arrested for murder in that the officers were already positing how the judge and jury would react to his claims of innocence.

A communication of a conclusive belief that a suspect is guilty of murder has to heavily impact the custody equation

because it obviously affects a reasonable individual's assessment of his freedom of action. "[I]t is nevertheless true that close and persistent questioning, accompanied by a warning as to the provisions of a criminal statute and an evident belief by the interrogating officers that the suspect is lying, may reasonably induce in a suspect the belief that he is no longer free to go about his business without significant restraint." U.S. v. Bekowies, 432 F.2d 8, 13 (9th Cir. 1970). *See also* Wilson v. Superior Court, 34 Cal.3d 777, 790 (1983) ("Common sense suggests to us that in such a situation, an ordinary citizen, confronted by a narcotics agent who has just told him that he has information that the citizen is carrying a lot of drugs, would not feel at liberty simply to walk away from the officer.")

The courts below placed much reliance on the officer's statement to petitioner at the outset of what was initially characterized as a "chat" that he was free to go. This statement was made while the police ruse of the "chat" was still in play; it was made but once at the outset of the interview. No such comments were made after the officers' true agenda unfolded and the accusations of murder commenced. *See* U.S. v. Lee, 699 F.2d 466, 467 (9th Cir. 1982) (being told he was "free to go" at outset of interview in a car in front of suspect's home still resulted in "custody" after officers then confronted the defendant with facts and made exhortations that he tell the truth).

This Court's rulings state that the determinative factor for the custody issue focuses on the time of the interrogation. The fact that petitioner was later allowed to leave after the interrogation (only to be arrested later) does not change the analysis of what a reasonable person would feel at the time of the

interrogation. An interrogation can be custodial even if the police decide to delay the arrest. *See* U.S. v. Beraun-Panez, 812 F.2d 578 (9th Cir. 1987) (interrogation statements suppressed even though arrest took place three months later).

The custody question still revolves around the totality of the circumstances. Thompson v. Keohane, 516 U.S. 99, 112 n. 11 (1995). One circumstance was that petitioner was taken from his daily regimen (going to work) and whisked away in a police car to a prosecutor's office miles away. That alone weighs heavily in support of a custody finding.

Miranda itself notes the police objective in taking a suspect downtown: "The officers are told by the manuals that the 'principal psychological factor contributing to a successful interrogation is privacy-being alone with the person under interrogation.' The efficacy of this tactic has been explained as follows: 'If at all practicable, the interrogation should take place in the investigator's office or at least in a room of his own choice. The subject should be deprived of every psychological advantage. In his own home he may be confident, indignant, or recalcitrant. He is more keenly aware of his rights and more reluctant to tell of his indiscretions or criminal behavior within the walls of his home. Moreover his family and other friends are nearby, their presence lending moral support. In his own office, the investigator possesses all the advantages. The atmosphere suggests the invincibility of the forces of the law.'" Miranda, *supra* at 449-450. [Footnote omitted.][6]

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[6] *See also* U.S. v. Wauneka, 770 F.2d 1434, 1439 (9th Cir.
(continued...)

The tables were turned on petitioner with the announcement by the interrogating officers at the prosecutor's office that petitioner had committed a rape and unlawful homicide, and that he needed to get something going for himself for later review in court. The petitioner's interrogators did not respect petitioner's answers, but continually denigrated them and informed him that he needed to "get something good going for" himself. Appendix, 21.

In Thompson v. Keohane, *supra*, this Court held that Mr. Thompson's case should be remanded for reconsideration by the lower federal courts which had mistakenly applied a presumption of correctness to the state findings of non-custody. In so ruling, the opinion held that the custody issue was to be reviewed *de novo*. The dissent held that even if *de novo* review were applied, as a matter of law, there could be no finding of custody on the facts presented.

Petitioner's case is far stronger for a custody finding than that in Thompson v. Keohane, *supra*. Thompson drove himself to the location of the police interview; in petitioner's case, petitioner was taken by police (using a ruse to get consent for the trip) miles away from his home to a prosecutor's office. Petitioner's interrogation was far more accusatory than in Thompson although both were the prime suspects in each case.

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[6](...continued)
1985) ("Wauneka had no means of transportation, and he was never offered an opportunity to leave the BIA office prior to his confession. A reasonable innocent person in such circumstances probably would have concluded that he was not free to leave. *See* U.S. v. Lee, 699 F.2d 466, 468 (9th Cir. 1982).")

The officers assured Thompson that he was free to leave throughout the interview; in petitioner's case, such a statement was made at the outset of what was promised to be a chat to update petitioner on the investigation, and was not mentioned again as the conversation went from a "chat" to an interrogation characterized by repeated accusations of homicide and inevitable future court proceedings.

In Oregon v. Mathiason, *supra,* this Court stated that the *brief* questioning of the suspect in the parole office (just minutes prior to the rights advisal) did not *per se* require a restraint of freedom of movement finding to amount to custody. The custody question still revolves around the factor-analysis of the totality of the circumstances including (1) the site of the interrogation, (2) whether the investigation has focused on the subject, (3) whether the objective indicia of arrest are present, and (4) the length and form of questioning.

Applying these factors here, custody is clear: (1) the site was in a prosecutor's office miles from petitioner's home and where he had been driven by the police; (2) the focus could not have been more clearly on petitioner as he was told he was responsible for the death of another human being; (3) the objective criteria of arrest were present in that petitioner was alone in a prosecutor's office being told he committed an unlawful homicide and that there would be future court proceedings in which he would have to "get something going for himself;" (4) the length and form of the questioning were prolonged, repetitive, and accusatory. In the words of the trial court, "the questioning became very pointed and accusatory...." RT 78.

In Stansbury v. California, 511 U.S. 318, 324 (1994), the

totality of evidence criteria were controlling. The court said that an officer's subjective view that the individual under questioning is a suspect, if undisclosed, does not bear upon the question whether the individual is in custody. But here, the officer's stated beliefs clearly conveyed to the suspect have to bear upon the custody issue. *See* U.S. v. Beraun-Panez, *supra* at 580-81 (repeated accusations of guilt suggest custody); U.S. v. Bekowies, 432 F.2d 8, 13 (9th Cir. 1970) (accord).

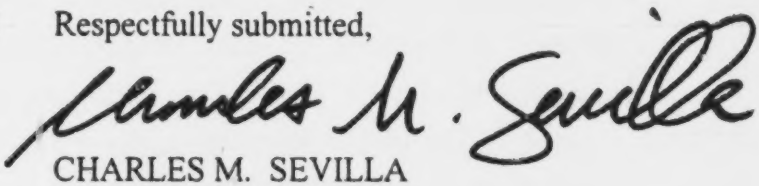
All of these factors weigh in favor of a custody finding, including the fact that after being badgered with accusations of guilt and that the judge and jury would not believe him when he was on trial, petitioner finally, on his own, invoked his right to silence and counsel.

In sum, this Court's logical approach to the custody calculus was not followed in petitioner's case. The California courts' concept of "custody," as approved by the federal court in this case, is wholly unrealistic and falls constitutionally short of the objective standard set by this Court. Certiorari should be granted to re-enforce the concept that "custody" occurs when the police attempt to avoid their duty to admonish a defendant of his constitutional rights by ruses, gamesmanship or outright disobedience to the rule of law.

CONCLUSION

For all of the foregoing reasons, it is respectfully requested that the Court grant *certiorari* on the three issues presented.

December 6, 2000 Respectfully submitted,



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APPENDIX: OPINION OF THE EN BANC NINTH CIRCUIT COURT OF APPEALS

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Samson Dubria,
Petitioner-Appellant,

v.

G.A. Smith, Warden,
Respondent-Appellee.

No. 98-55914
D.C. No.
CV-96-00657-JK
(AJB)

OPINION

Appeal from the United States District Court
for the Southern District of California
Judith N. Keep, Chief District Judge, Presiding

Argued and Submitted February 4, 1999
Pasadena, California

Opinion filed November 19, 1999
Order Granting Rehearing En Banc
Filed March 9, 2000

Argued and Submitted En Banc
June 22, 2000--San Francisco, California

Filed September 11, 2000

Before: Procter Hug, Jr., Chief Judge, Mary M. Schroeder, Harry Pregerson, Ferdinand F. Fernandez, Pamela Ann Rymer, Thomas G. Nelson, Andrew J. Kleinfeld, Michael Daly Hawkins, Sidney R. Thomas, Susan P. Graber, and Ronald M. Gould,
Circuit Judges.

Opinion by Judge Hawkins
Dissent by Judge Pregerson.

COUNSEL

Charles M. Sevilla, Cleary & Sevilla, San Diego, California for the petitioner-appellant.

Frederick R. Millar, Jr., Office of the State Attorney General, San Diego, California, for the respondent-appellee.

OPINION:

HAWKINS, Circuit Judge:

Dr. Samson Dubria ("Dubria"), a California state prisoner, appeals the district court's denial of his federal petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. This matter was heard originally before a three-judge panel of this court. We accepted the case for en banc review and now affirm the district court. Our jurisdiction is pursuant to 28 U.S.C. § 1291.

BACKGROUND

Dubria was found guilty following a jury trial of first degree murder, rape by the use of drugs, and administering a drug in order to enable and assist himself to commit a felony. Dubria was given a mandatory sentence of life in prison without the possibility of parole. Following the denial of his consolidated direct and collateral appeals in state court, Dubria sought habeas relief in district court.

The relevant events began in 1990 when Dubria became friends with Jennifer Klapper ("Klapper") while the two were co-workers at an Ohio hospital. Their relationship was not romantic. Klapper had stated that she was not physically attracted to Dubria and, at

the time of her death, she was romantically involved with another man with whom she was discussing marriage. In the spring of 1991, Dubria invited Klapper to attend his class reunion in California. Klapper was a television and movie fan and did not have the financial means to take a trip to California on her own. She also expressed reservations about the invitation. She told a friend that she felt uncomfortable about going on the trip because she did not know what Dubria expected from her. She also told her boyfriend that she did not want to be away from him. Klapper's sister overheard a telephone conversation in which Klapper told Dubria that their relationship was platonic and that she had a boyfriend. Further, she told Dubria that if he expected to have physical relations while on the trip, she would have to cancel her plans to go.

Dubria flew to California alone and in advance of Klapper and then picked her up at the airport several days later. The pair spent the next few days touring Southern California, spending their evenings at the home of Dubria's parents and sleeping in separate rooms. On August 15, 1991, after watching a taping of the Johnny Carson Show, they planned on camping overnight at the San Elijo State Beach Campground between Los Angeles and San Diego. Instead of camping out, the pair checked into the Allstar Inn in Carlsbad, California.

At about 3:09 a.m., Carlsbad police responded to a 911 call at the Allstar Inn. Klapper was lying unconscious on the bed closest to the door. She had no pulse and was not breathing. Dubria and a police officer administered CPR. Firefighters and paramedics arrived shortly thereafter and were able to restore some electrical activity in Klapper's heart, but not a normal beat. Neither the police nor any of the emergency personnel smelled a chemical odor in the room. Klapper was immediately transferred to a local hospital where further attempts to revive her were unavailing.

Emergency room physicians pronounced Klapper dead at 3:52 a.m., but were unable to determine a cause of death.

Several hours after her death, Klapper's body was examined by a coroner's investigator, who noticed that Klapper was missing an earring in her left ear, and the lycra pants she was wearing were on inside out. The investigator also noticed scratches on her face, including a half-moon scratch on her left cheek. The investigator examined the room at the Allstar Inn and in the trash can found a beer can, a carton of fuzzy navel mixed drink, and a styrofoam cup containing a yellowish liquid. None of the items had any odor except that of alcohol, and they were not preserved.

Dubria willingly spoke with Carlsbad police officers three times during the early morning of August 16, relating essentially the same story each time: he and Klapper had planned on staying at a campsite that night and when their plans to stay at the campsite fell through, they decided to get a motel room. They arrived at the Inn at about 11:30 p.m. He drank a beer and a mixed drink and Klapper had a few sips of the mixed drink. Klapper moved over on the bed she was lying on and signaled for Dubria to join her. He put his arm around her and they cuddled in the bed. They talked, kissed, and eventually had sex. He stated that, before they had intercourse, he asked her if she was using any birth control and she told him that she was taking birth control pills. After they had intercourse, Klapper went to the bathroom, then Dubria went to the bathroom, and they went to sleep in the same bed.

Dubria stated that, after Klapper fell asleep, she tossed and turned. At about 3:00 a.m., he awoke to go to the bathroom. While in the bathroom, he heard a "thud" and a moan and, when he returned, he found Klapper on the floor. She was not breathing and had no pulse. He administered CPR for about five minutes. He then panicked and, instead of calling 911 from the room, he

ran out of the room for help. The person working in the motel office told him to call 911 from his room. He ran back to the room, found himself locked out, ran back to the motel office, got a spare key, and ran back to the room to call 911. The police arrived a few minutes later. Dubria, who had been with Klapper almost continuously that day and night, stated that he had no idea why she died.

After Dubria returned to the medical facility where he was working in New Jersey, an autopsy was performed on Klapper's body. The examiner, forensic pathologist Dr. Leena Jariwala, found some cuts and abrasions on Klapper's right eyelid, her right chin, her left cheek, and the tip of her nose. Dr. Jariwala concluded that these injuries were inflicted before Klapper's heart stopped beating. Dr. Jariwala and the emergency personnel also concluded that these injuries were inconsistent with the efforts of emergency personnel to revive her on the night of her death. Dr. Jariwala's examination also revealed that Klapper had sexual intercourse relatively close to the time of her death. After completing the autopsy, Dr. Jariwala could find no cause of death.

Toxicological tests were performed and the only anomalous result was a heightened level of chloroform in Klapper's blood, liver tissue, and gastric organs. Dr. Jariwala concluded that the cause of death was chloroform intoxication.

On October 23, 1991, Carlsbad detectives visited Dubria at his New Jersey home. They interviewed him at a nearby office. The officers told Dubria that they believed he had accidently murdered Klapper when he administered chloroform in order to rape her. Dubria stuck to his story that he had no idea how Klapper had died and specifically denied trying to rape her or playing any role in her death. The officers did not arrest Dubria that day but later charged him with Klapper's rape and murder.

At trial, Dr. Lucien Morris, a state expert with extensive knowledge of chloroform, explained that chloroform is an extremely potent and dangerous anesthetic. He stated that the standard method for administration of chloroform was to place one drop on a cloth over a patient's face, return in one minute and place two drops on the cloth, then return in another minute and again double the dose and so on until the desired level of anesthesia is reached. This method avoids sudden exposure to concentrations of chloroform, which can be lethal. Chloroform is now seldom used because the margin of error between enough chloroform and too much is very small.

Dr. Morris noted that death from chloroform inhalation can occur when a small amount of chloroform is inhaled suddenly. The concentration of chloroform in the blood rises quickly and disrupts the heart. The amount of chloroform that can cause death under these circumstances is very small. Dr. Morris also noted the dangers of administering chloroform to a sleeping person. He explained that, if the person awakened and became frightened, the resulting release of adrenaline could interact adversely with the chloroform. Dr. Morris concluded that Klapper had died from a sudden inhalation of a small dose of chloroform.

Dr. Morris also stated that, although chloroform has a strong odor, the odor does not persist. He testified, that assuming Dubria administered chloroform to Klapper in the motel room, it would have been possible for the smell to have dissipated before the police and emergency personnel arrived.

Dr. Gregory Schwartz, the defense medical expert and an emergency room physician, agreed with Dr. Morris about the dangers of chloroform. Dr. Schwartz concluded that Klapper died after having ingested, rather than inhaled, chloroform. He noted that chloroform's use as a recreational drug is on the rise,

although it is still relatively rare. He thought Klapper had overdosed on chloroform. He stated that, if she had inhaled chloroform, the odor would not have dissipated before the police and emergency room personnel arrived because the smell would persist in a closed room for eight to twelve hours. He noted that, if Klapper had ingested the chloroform, less vapor would have evaporated and there would be less of a smell. He conceded, however, that one could get rid of the smell of chloroform quickly. Dr. Schwartz also believed that the injuries to Klapper's face were consistent with attempts to revive her.

Dubria took the stand in his own defense. He stated that his relationship with Klapper was not platonic. Before he and Klapper had gone to California, he had been on several formal dates with her. He had been attracted to her since early in their relationship and he had first kissed and cuddled with her in April 1991, and then again in May 1991 after going bowling. Dubria's testimony about the night of Klapper's death was consistent with the story that he had repeated to police immediately after Klapper's death and at the later interview in New Jersey.

The jury convicted Dubria of first degree murder, rape by the use of drugs, and administering a drug in order to enable and assist himself to commit a felony. On the murder charge, the jury also found the special circumstance of rape to be true, and Dubria was sentenced to life in prison without the possibility of parole. Dubria appealed to the California Court of Appeal. His direct appeal and state habeas petition were consolidated and both were denied in a written unpublished opinion on July 18, 1995. His petition for review by the California Supreme Court was denied without opinion on October 19, 1995, and his petition for a writ of certiorari to the United State Supreme Court was denied on February 20, 1996, Dubria v. California, 516 U.S. 1118, 133 L. Ed. 2d 852, 116 S. Ct. 923 (1996).

Dubria filed the instant habeas petition in federal district court, which denied the petition on the merits. He timely filed an appeal and a three-judge panel reversed the district court, see Dubria v. *Smith, 197 F.3d 390 (9th Cir. 1999). We granted the state's* petition for en banc review.

STANDARD OF REVIEW

We review the district court's decision to grant or deny habeas relief de novo. See McNab v. Kok, 170 F.3d 1246, 1247 (9th Cir. 1999) (per curiam). State court findings of fact are given a presumption of correctness. See 28 U.S.C. § 2254(e)(1) (1996); Jeffries v. Wood, 114 F.3d 1484, 1499-1500 (9th Cir. 1997) (en banc). The district court's factual findings are reviewed for clear error. See Houston v. Roe, 177 F.3d 901, 905 (9th Cir. 1999). Claims of ineffective assistance of counsel are mixed questions of law and fact and are reviewed de novo. See Crotts v. Smith, 73 F.3d 861, 864 (9th Cir. 1996), superseded by statute as stated in Van Tran v. Lindsey, 212 F.3d 1143, 2000 WL 622070 (9th Cir. May 16, 2000) (to be reported at 212 F.3d 1143). n1

ANALYSIS

1. The Pre-Arrest Interview

Dubria claims constitutional error from the admission of the unredacted tape and transcript of his New Jersey interview by police detectives. During this interview, the detectives, in

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n1 Dubria filed his petition before the effective date of the Antiterrorism and Effective Death Penalty Act ("AEDPA"). Therefore, AEDPA's changes to our standard of review do not apply here. See Lindh v. Murphy, 521 U.S. 320, 138 L. Ed. 2d 481, 117 S. Ct. 2059 (1997).

particular Detective Detar, challenged Dubria about his explanation of the events and repeatedly told him that no judge or jury would believe him if he stuck to his story. The state claims that Dubria procedurally defaulted on this issue by failing to make a contemporaneous objection at trial. The state also argues in the alternative that, even if there is no procedural bar, the district court did not commit error in admitting the unredacted tapes.

We conclude that we may examine the merits of this issue because defense counsel made a sufficiently broad objection at trial and because the state appears to have waived any procedural bar by failing to raise the issue in its response to the habeas petition, see United States v. Barron, 172 F.3d 1153, 1156 (9th Cir. 1999) (en banc). "Because there are no extraordinary circumstances present in this case which would suggest that justice would be served by overlooking the government's omission," id. at 1156-57, we conclude that even if defense counsel's objection was not adequate, the State waived its right to claim procedural default.

Reaching the merits of this claim, we conclude that Dubria cannot meet the standard that the admission of the tape and transcript "so fatally infected the proceedings as to render them fundamentally unfair." Jammal v. Van de Kamp, 926 F.2d 918, 919 (9th Cir. 1991). "'Federal habeas corpus relief does not lie for errors of state law.'" Estelle v. McGuire, 502 U.S. 62, 67, 116 L. Ed. 2d 385, 112 S. Ct. 475 (1991) (quoting Lewis v. Jeffers, 497 U.S. 764, 780, 111 L. Ed. 2d 606, 110 S. Ct. 3092 (1990)). Therefore, we cannot grant habeas relief upon reexamination of state-court determinations of questions of state law; we can grant relief only when the conviction "violates the Constitution, laws, or treaties of the United States." 502 U.S. at 68.

The question before us is whether admission of the unredacted

tape and transcript violated Dubria's constitutional right to due process. Dubria acknowledges that the tape and transcript were admissible for a limited purpose - to show that, when confronted with the toxicological tests, Dubria could not and did not explain why a woman he was continuously alone with for the prior 24 hours suddenly turned up dead from chloroform intoxication. When confronted with the toxicological tests, Dubria maintained that he was not involved in Klapper's death. He also suggested that maybe Klapper took the chloroform herself or that both of them may have been exposed to chloroform when they drove behind a chemical truck.

Dubria claims instead that certain portions of the tape and transcript should have been redacted. He argues that Detective Detar's comments and questions contained statements of disbelief of Dubria's story, opinions concerning Dubria's guilt, elaborations of the police theory of Klapper's death, and references to Dubria's involvement in the crime. Viewed in its entirety, however, the tape and transcript show what the state appellate courts quite properly described as an "unremarkable interview." n2 The questions and comments by Detective Detar placed Dubria's

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n2 The California Court of Appeal concluded that it found the interview generally unremarkable. There is no doubt the officers were accusatory and suggested in a variety of ways they did not believe appellant. The jury would certainly understand this to be the police position and would give to it no more weight than they would the fact appellant was charged by the prosecutor with murder or that the prosecutor clearly also disbelieved appellant. . . . The officers' comments, however, suggested no more than what the People proposed to prove at trial. There was nothing particularly damning in the officers' statements or suggestions of evidence or theories that the People did not present or offer at trial.

answers in context, much like a prosecutor's questions at trial. There was nothing in Detective Detar's statements that suggested evidence or theories of the case that were not presented at trial.

Nor do we find conclusive the argument that the jury impermissibly gave the comments added weight because they were made by a law enforcement officer. Although we have cautioned that testimony of law enforcement officers "'often carries an aura of special reliability and trustworthiness,'" United States v. Gutierrez, 995 F.2d 169, 172 (9th Cir. 1993) (quoting United States v. Espinosa, 827 F.2d 604, 613 (9th Cir. 1987)), we examine officers' statements in context to determine whether they fundamentally affect the fairness of the trial, see id. (no error in introduction of evidence). n3 Here, Detective Detar's statements were questions in a pre-trial interview that gave context to Dubria's answers. They were not the types of statements that carry any special aura of reliability. Cf. Gutierrez, 995 F.2d at 172 (district court did not abuse discretion in admitting officer's testimony in court that defendant's behavior was "furtive"); Espinosa, 827 F.2d at 612 (officer's expert testimony in court that defendant acted in accordance with usual criminal modus operandi was admissible).

Furthermore, even if it was error to admit the tapes and transcripts without redacting Detective Detar's statements, any

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n3 We do not assume that the opinions of an investigating officer are presumptively prejudicial. Cf. United States v. Harber, 53 F.3d 236, 238, 240-41 (9th Cir. 1995) (presuming prejudice when law enforcement officer's report, introduced into evidence only for identification and to refresh officer's memory as to certain facts, which included statements that officer thought defendant was guilty, was mistakenly given to the jury for their deliberations and was read by them).

error was cured by the judge's two cautionary instructions. In response to an objection by defense counsel, the judge told the jury:

Ladies and gentlemen, you should view the questions and answers in the same way that you view the questions and answers in the courtroom. In other words, the questions are only pertinent as they may explain what the answers themselves are. You are not to assume as true anything that Detective Detar says in his questions. The questions are only pertinent as they give meaning to the answers.

Later, the judge repeated to the jury:

Again I want to caution you, too, you are not to consider any of the statements that Detective Detar makes for the truth of the matters asserted in those statements. Those are just questions or statements in the forms - questions in the form of statements. They are not to be considered for the truth, they are only to be considered as how they may give meaning to the answers.

Any impression that the jury may have had that it could consider Detective Detar's statements to be true was specifically and timely corrected by the trial judge. See Donnelly v. DeChristoforo, 416 U.S. 637, 644, 40 L. Ed. 2d 431, 94 S. Ct. 1868 (1974). Ordinarily, a cautionary instruction is presumed to have cured prejudicial impact. See United States v. Merino-Balderrama, 146 F.3d 758, 764 (9th Cir. 1998).

This is not a case in which the statements at issue are so clearly prejudicial that a curative instruction could not mitigate their effect. Dubria attempts to draw an analogy to Bruton v. United States, 391 U.S. 123, 20 L. Ed. 2d 476, 88 S. Ct. 1620 (1968), in which the Supreme Court concluded that a curative instruction

was insufficient to mitigate the prejudicial effect of a co-defendant's confession that implicated the appellant. In that case, the Court held that the jury could not perform the overwhelming task of considering the confession in determining the guilt of the co-defendant and then ignoring it when determining the guilt of the appellant. n4 See id. at 131. Here, in contrast, the jury had to simply do what it is asked to do all the time - consider the questions posed by Detective Detar as mere questions and not as evidence.

Further, the Court in Bruton based its holding in part on the fact that the co-defendant never testified at trial and, therefore, that the appellant was denied his constitutional right of confrontation. See id. at 128. Here, there was no denial of that right, as both Detective Detar and Dubria took the stand and could be questioned about the interview.

Finally, while it is clear that, under California law, tapes should be redacted to remove material that is either impermissible or would unfairly prejudice the defense, see People v. Sanders, 75 Cal. App. 3d 501, 508, 142 Cal. Rptr. 227 (1977), "not every trial error or infirmity which might call for application of supervisory powers correspondingly constitutes a 'failure to observe that fundamental fairness essential to the very concept of justice.'" Donnelly, 416 U.S. at 642 (quoting Lisenba v. California, 314 U.S. 219, 236, 86 L. Ed. 166, 62 S. Ct. 280 (1941)). We conclude that admission of these comments and statements did not violate Dubria's fundamental right to due process.

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n4 The facts of Bruton were even more compelling, in fact, because the co-defendant's conviction was reversed on the ground that his confessions were inadmissible against him, and on retrial he was acquitted. See id. at 133 n.9.

2. Prosecutor's Closing Argument/Ineffective Assistance of Counsel

While en banc review of this appeal was pending, the Supreme Court decided Slack v. McDaniel, 146 L. Ed. 2d 542, 120 S. Ct. 1595, 1600-01 (2000). Slack held that AEDPA governs the right to appeal a district court's dismissal of a habeas petition, like Dubria's, pending on AEDPA's effective date, April 24, 1996. Id.

AEDPA amended 28 U.S.C. § 2253, which now provides, in pertinent part, that "unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals . . . . The certificate of appealability . . . shall indicate which specific issue or issues satisfy the showing requirement." Slack held that the court of appeals should have treated the petitioner's notice of appeal as an application for a certificate of appealability ("COA"). It then examined the issues to determine if any met the showing requirement. See 120 S. Ct. at 1603. If Dubria had not filed a motion for a COA in the district court, we could treat his notice of appeal as a motion for a COA, and Slack would not change our ability to consider any issue we concluded met the showing requirement. See Schell v. Witek, 218 F.3d 1017, at n.4 (9th Cir. 2000) (en banc). Dubria, however, did file a motion for a COA in the district court and the district court explicitly refused to certify for appeal the issue of trial counsel's failure to object to statements made by the prosecutor in closing argument that Dubria was a liar, that he made up a story, and that

the story was "garbage." n5

The original panel, ruling without the benefit of Slack, followed our precedent, and that of seven other circuits, and held that the district court improperly applied the COA procedure because Dubria's petition was filed prior to AEDPA's effective date. The panel concluded that it was not limited by the COA and could address all issues on appeal. The panel relied in part on defense counsel's failure to object to the "garbage" statement made by the prosecutor to conclude that defense counsel provided ineffective assistance.

Considering this issue on the merits, however, we conclude that defense counsel did not provide ineffective assistance. Dubria's claim arises out of trial counsel's failure to object to the following portion of the prosecutor's closing argument:

But to get up here and get on the stand and look at you people and tell you the story that he told you in front of the family, this piece of garbage, making up every little bit of it, he's the biggest liar you've ever encountered. He's worse than that. I'm not going to tell you. You can imagine some of the things I could tell you what he really is. I'm not going to tell you, because you know. You know in your hearts what else.

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n5 Circuit Rule 22-1, effective January 1, 1999, requires that a petitioner file a motion in the court of appeals to expand a COA where the district court partially granted the COA. The parties neither briefed nor argued on appeal before the original panel or before the en banc court whether Circuit Rule 22-1 precludes review of the "garbage" issue, see United States v. Zuno-Arce, 209 F.3d 1095, 1099-1100 (9th Cir. 2000), and we decline to reach the issue here.

To establish ineffective assistance of counsel, Dubria would have to show that his trial counsel's failure to object to these statements fell outside the wide range of professionally competent assistance and that this deficient performance prejudiced his defense. See Strickland v. Washington, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984).

Both the California Court of Appeal and the district court found that the "piece of garbage" reference, when read in context, referred to Dubria's story, not to Dubria himself. We see no reason to disagree. Cf. Williams v. Borg, 139 F.3d 737, 744-45 (9th Cir. 1998) (prosecutor's reference to defense argument as "trash" not improper). Furthermore, even assuming that "piece of garbage" referred to Dubria, we would not conclude that trial counsel fell below the Strickland standard by not objecting. Cf. United States v. Laurins, 857 F.2d 529, 539 (9th Cir. 1988) (statement that defendant was a liar could be construed as a comment on the evidence). While it is clear that prosecutors cannot express their opinion about a defendant's guilt or vouch for government witnesses, see United States v. Molina, 934 F.2d 1440, 1444 (9th Cir. 1991), a prosecutor is free to voice doubt about the veracity of a defendant's story. See United States v. Sarno, 73 F.3d 1470, 1496-97 (9th Cir. 1995); Molina, 934 F.2d at 1445 (the inference that one side is lying is unavoidable).

Dubria also claims that the last four lines of this portion of the prosecutor's closing argument improperly suggested to the jury that the prosecutor had personal knowledge of Dubria's character and guilt. n6 The prosecutor called Dubria a liar. He then stated that Dubria was "much worse than that. I'm not going to tell you. You can imagine some of the things I would tell you . . . I'm not

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n6 The district court certified this issue for appeal.

going to tell you, because you know." The meaning of these words is unclear. These lines could refer to Dubria as a murderer and a rapist - what the prosecutor was trying to prove at trial. Given the ambiguity in these words, we conclude that a reasonably competent attorney could have refrained from objecting.

3. Remaining Claims

We have also considered Dubria's other claims of violation of Miranda, instructional error, ineffective assistance of counsel, insufficiency of the evidence, exclusion of evidence of Klapper's knowledge of birth control methods, and unconstitutionality of his sentence, and hold that they are without merit.

AFFIRMED.

PREGERSON, Circuit Judge, dissenting:

Dubria did not get a fair trial. The trial judge allowed the state, in its case-in-chief, to place into evidence a tape of a pre-arrest interview of Dubria. On that tape, Detective Detar made highly inflammatory statements in an effort to elicit information from Dubria about the circumstances surrounding Jennifer Klapper's death. Later, a transcript of the tape was given to the jury. Because I believe that admitting the tape and transcript of the pre-arrest interview into evidence violated Dubria's due process right to a fair trial, I respectfully dissent.

The pre-arrest interview of Dubria contained in the tape and transcript was not innocuous. During the interview, Detective Detar repeatedly: (1) stated that he believed that Dubria was responsible for Klapper's death; (2) told Dubria that the judge and

jury would not believe his story; and (3) stated that other witnesses and evidence existed that proved that Dubria was responsible for Klapper's death. Indeed, the tape and transcript of the pre-arrest interview included long narratives during which Detective Detar reiterated his opinion that Dubria was responsible for Klapper's death. For example, the interview included the following exchanges:

Detar:
I think, that this was probably just an accident, okay. But there's no question . . .
Dubria:
But detective . . .
Detar:
But listen. Wait, wait, wait . . . let me finish, let me finish.
Dubria:
Okay.
Detar:
There's no question. The evidence is conclusive.
Dubria:
No.
Detar:
That your [sic] responsible. Okay?
Dubria:
No.

* * *

Dubria:
Okay, detective, can I ask you a question . . . unintelligible . . .
Detar:
Sure.
Dubria:
Because your [sic], you saying that I had something to do with her death. What, what's the evidence that you [sic] telling me that I have to do it . . .
Detar:

Wait, wait, wait, wait, wait, wait, wait, wait a minute, wait a minute. I'm not here to play any kind of game.
Dubria:
I understand.
Detar:
I want you to understand something. You know what happened there and, and I know what happened there . . .

Dubria:
Okay.
Detar:
So now this is the opportunity for you to come clean, for you to do something good for you to day. . . (sound of sigh), look guys I need to tell you something.
Dubria:
Um-hum.
Detar:
. . . a, this is what happened.
Dubria:
Um-hum.
Detar:
Um, I messed up and I'm sorry.
Dubria:
Um-hum.
Detar:
Um, I believe and there's no doubt in my mind.
Dubria:
Um-hum.
Detar:
That you caused her death. And I don't think that your [sic] a murderer or anything like that . . .
Dubria:
Uh.
Detar:

But a, I have no doubt that, that you caused her death. Okay?
Dubria:
That's a, that's a strong accusation . . .
Detar:
So what I'm asking this, you know, I'm not accusing you of anything. I'm stating what I feel the facts are.
Dubria:
Right.
Detar:
And the facts show that your [sic] responsible for it . . . .

* * *

Detar:
I, I'm just flabbergasted, I, to be honest with you Sam, I think your [sic] digging yourself in a hole. . .
Dubria:
Um-hum.
Detar:
. . . that is going to cause you more grief cause I'll tell you something. What's gonna happen is . . . either "A" your [sic] a cold blooded murderer . . .
Dubria:
No, I'm not.
Detar:
Listen to me. Listen to me. This is important for you to understand. I want you to grasp this because I do care. Okay, if you lie to us, then the jury and everybody else in the world is gonna say, he's a cold blooded murderer. Okay? Listen to me I'm not done yet. Okay. Now listen to me.
Dubria:
Alright.
Detar:
Either "A", that's what [sic] gonna happen, or "B" it's gonna come across like, he made a mistake. It was an accident. He didn't mean to kill her, as a matter of fact he was so distraught and upset

about the fact, that he did CPR, he called the paramedics, it was a mistake, it was an accident. The jury and the judge will believe that. They're not going to believe all these lies.

As evidenced by the excerpts, for long periods of time during the interview Detective Detar simply stated his opinion about what happened to Klapper and did not ask Dubria any questions. At one point, Detar explained to Dubria his theory about what occurred the night Klapper died. When Dubria protested that Detective Detar was "putting words in [his] mouth," Detar replied, "I really believe this." Additionally, Detective Detar repeatedly told Dubria that no one on the jury would believe his story:

Detar:

I [can write down your version of the events w]hich everybody in the world is gonna know is a lie, or I can tell them the truth about the issue. That there was a mistake, that it was an accident . . .

* * *

Detar:

They're not gonna believe that you have no clue as to how she died. Think about it!

* * *

Detar:

Sam, I want you to think about what your [sic] saying. I want you to think, you gotta get something good going for you. If you tell that story man, there ain't nobody that's going to believe that.

* * *

Detar:

I realize what your story is. What I'm trying to tell you is, it's obvious to everybody that that's not the truth.

Moreover, several times during the interview Detective Detar referred to other "evidence" that established that Dubria was responsible for Klapper's death. This other "evidence" was not introduced at trial because it did not exist. Detar simply referred to such evidence as an interrogation tactic to get Dubria to admit that he was guilty. But the jury heard the tape and read the transcript and thus was given the distinct impression that other evidence, apart from the evidence admitted at trial, proved that Dubria was guilty. For example, the tape and transcript included the following exchanges:

Detar:
Okay. If I told you someone said you were responsible for her death, what would you say?

* * *

Detar:
Talked to a lot of people.
Dubria:
Um-hum.
Detar:
And a, pretty much, we've determined that you are responsible for her death.

* * *

Detar:
You don't have any access to chloroform?
Dubria:
No.
Detar:
So all the people that I talked to that say that chloroform is all over the hospital, will say, are liars?

* * *

Detar:
We've got experts, medical examiners, toxicologist. . .
Dubria:
Um.

Detar:
They did all the tests Sam!
Dubria:
Um.
Detar:
She died of chloroform poisoning. There were [sic] no other causation, absolutely zip. She died of an overdose of chloroform.
* * *

Detar:
Yeah. Let me tell you something. It's not just the chloroform intoxication that points to you.
Dubria:
Okay.
Detar:
There's a lot of other things that point right at you.

The State proffered the unedited tape of the interview in its case-in-chief to show that Dubria had no explanation for the presence of chloroform in Klapper's body. Although only a small portion of the interview actually dealt with the presence of chloroform in Klapper's body, the entire interview was entered into evidence. None of Detar's inflammatory statements were excised from the tape before it was played to the jury. Later, over Dubria's counsel's objection, a transcript of the interview was given to the jury. Like the tape, the transcript was not edited at all.

The majority opinion concludes that, "viewed in its entirety," the tape and transcript merely show an "unremarkable interview" because, according to the majority, "there was nothing in Detective Detar's statements that suggested evidence or theories of the case that were not presented at trial." See Maj. Op. at 11361. I disagree. In the interview, Detective Detar did suggest

that other evidence existed that was not presented at trial. Specifically, Detar falsely stated that other individuals had claimed that Dubria was responsible for Klapper's death, that all of the state's experts did "all the tests" and determined that Klapper positively died from chloroform poisoning, and that chloroform was "all over the hospital" where Dubria worked. Thus, I disagree with the majority's characterization of the interview as "unremarkable."

Additionally, the introduction of the tape and transcript of the pre-arrest interview is particularly troubling because the prosecution's evidence against Dubria was far from overwhelming. By entering into evidence the tape and transcript, the prosecution was able to present the jury with Detective Detar's theory of how and why he thought that Dubria killed Klapper. The long narratives by Detective Detar only served to inform the jury of Detar's otherwise inadmissible opinion that he had no doubt that Dubria had caused Klapper's death, and that no one - not the judge or jury - would believe Dubria's version of events. It is unrealistic to believe that such prejudicial evidence did not impact the jury's ability to evaluate, fairly and objectively, the evidence against Dubria.

Moreover, it is also significant that the inflammatory statements, which the jury heard and read, were made by Detective Detar, an investigating officer in the case. We have repeatedly acknowledged the inherent danger in admitting opinion testimony of law enforcement officers because we recognize that such testimony "carries an aura of special reliability and trustworthiness." United States v. Gutierrez, 995 F.2d 169, 172 (9th Cir. 1993) (quoting United States v. Espinosa, 827 F.2d 604, 612 (9th Cir. 1987)). Indeed, in United States v. Harber , 53 F.3d 236 (9th Cir. 1995), we noted that the admission of an investigating officer's opinion about the defendant's guilt is a

"classic example of presumptive prejudice." 53 F.3d at 241. And in Harber we held that "extrinsic material consisting of a governmental official's summary of the prosecution's evidence, and his recommendation that an indictment should be requested because the accused is guilty, is inherently or presumptively prejudicial where it is read and relied upon by the jury." Id. (emphasis added). I see no valid basis for distinguishing Harber from the present case. In both cases the jury read and relied on extrinsic evidence that consisted of an investigating officer's opinion that the defendant was guilty. Consequently, I believe that admitting the tape and transcript of the pre-arrest interview in this case was "presumptively prejudicial."

Given the highly inflammatory content of the tape and transcript, and that the statements were made by an investigating officer, I conclude that the admission of the evidence "so fatally infected the proceedings as to render them fundamentally unfair." Jammal v. Van de Kamp, 926 F.2d 918, 919 (9th Cir. 1991). The trial judge did give the jury cautionary instructions. But, in light of the extremely prejudicial nature of Detar's statements, as well as the fact that a transcript of the interview was also later given to the jury, see United States v. Hernandez, 27 F.3d 1403, 1408 (9th Cir. 1994) (noting that juries may put undue emphasis on particular testimony if provided with transcripts), I cannot conclude that the instructions cured the impact of Detar's statement on the fairness of Dubria's trial, see United States v. Gillespie, 852 F.2d 475, 479 (9th Cir. 1988) (finding under the circumstances that "the trial court's curative instruction to the jury was not sufficient to obviate the prejudice.").

Additionally, in contrast to the majority opinion, I believe that Dubria's ineffective assistance of counsel claim has merit. Dubria's ineffective assistance of counsel claim is based on his trial counsel's failure to object during closing argument when the

prosecutor called Dubria a "piece of garbage" and suggested that he had personal knowledge of other bad acts committed by Dubria. The prosecutor stated:

But to get up here and get on the stand and look at you people and tell you that story that he told you in front of the family, this piece of garbage, making up every bit of it, he's the biggest liar you've ever encountered. He's a lot worse than that. I'm not going to tell you. You can imagine some of the things I would tell you what he really is. I'm not going to tell, because you know. You know in your hearts what else.

To establish ineffective assistance of counsel, Dubria must demonstrate that his counsel's failure to object was deficient, and that the deficient performance prejudiced Dubria's defense. See Strickland v. Washington, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). Clearly, Dubria's counsel's failure to object was deficient. The prosecutor engaged in misconduct when he suggested that Dubria was a "piece of garbage." n1 See United States v. Sanchez, 176 F.3d 1214, 1225 (9th Cir. 1999)

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n1 I disagree with the majority's conclusion that the prosecutor was simply referring to Dubria's story when he stated "this piece of garbage." Nonetheless, if the prosecutor had indeed been referring to Dubria's story when he said "this piece of garbage," an objection from the defense would have resulted in clarification for the jury. The statement is certainly unclear, and a reasonable person could conclude that the prosecutor was calling Dubria "a piece of garbage."

(prosecutor commits misconduct when denigrating the defense as a sham); United States v. Molina, 934 F.2d 1440, 1444 (9th Cir. 1991) (prosecutor may not express his opinion of the defendant's guilt or his belief in the credibility of the government's witnesses). And the prosecutor disregarded his obligation "to avoid improper suggestions, insinuations, and especially assertions of personal knowledge," United States v. Edwards, 154 F.3d 915, 921 (9th Cir. 1998), when he told the jury that Dubria: "is a lot worse than [the biggest liar you've ever encountered]. I'm not going to tell you. You can imagine some of the things I would tell you what he really is." There was certainly no tactical advantage to be gained by Dubria by allowing the prosecutor to make such improper comments. Therefore, I would find that Dubria's counsel's failure to object to closing argument fell below the objective standard of reasonable representation.

Whether the ineffective assistance prejudiced Dubria's defense is a closer question. To demonstrate prejudice, Dubria "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. Although Dubria's counsel's deficient performance alone may not have altered the outcome of Dubria's trial, I conclude that the cumulative impact of the prejudice from this harm and that harm caused by the admission of the unredacted tape and transcript of Dubria's pre-arrest interview, deprived Dubria of his right to a fair trial. See Mak v. Blodgett, 970 F.2d 614, 622 (9th Cir. 1992).

Accordingly, I would reverse the district court's denial of Dubria's habeas petition.

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

(2)

No. 00-

In the Supreme Court of the United States

Samson Dubria,
Petitioner,
v.
G.A. Smith, Warden,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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ORDER ADOPTING MAGISTRATE JUDGE'S
REPORT AND RECOMMENDATION
DENYING PETITIONER'S 28 U.S.C. §2254
PETITION FOR WRIT OF HABEAS CORPUS
OF FEBRUARY 23, 1998 40

FILED
FEB. 13, 1997
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY // DEPUTY

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

SAMSON DUBRIA, Petitioner, v. D.A. SMITH, Warden, California State Prison Corcoran, California, Respondent.	Civil No.96-657 BTM(AJB) Report and Recommendation

Petitioner, a state prisoner, proceeding by and through his counsel Charles M. Sevilla,. has filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. §2254. Based upon all the papers filed in the case, and a review of the record, it is the recommendation of Magistrate Judge Battaglia that the petition be DENIED.

Procedural History

Petitioner was found guilty following a jury trial of murder together with a special circumstance of murder in the commission and attempted commission of rape. The jury found the murder to

be of the first degree. Petitioner was also found guilty by the jury of rape by use of drugs and of administering a drug in order to enable and assist himself to commit a felony. On April 16. 1993, Petitioner was sentenced to state prison for life without the possibility of parole for the special circumstance murder.

Petitioner filed an appeal with the California Court of Appeal, Fourth Appellate District, Division One, as well as a Petition for a Writ of Habeas Corpus. Both the appeal and the petition were denied by the Court of Appeal on July 18, 1995. Petitioner's petition for review with the California Supreme Court was also denied on October 19, 1995. Petitioner filed a Petition for Writ of Certiorari with the United States Supreme Court which petition was denied on February 20, 1996. Respondent does not dispute that Petitioner has exhausted his available state remedies.

Factual Background.[1]

Prosecution Case.

1. Death of Jennifer Klapper. At approximately 3:09 a.m. on August 16, 1991, the Carlsbad Police Department was dispatched Room 224 at the All-star Inn in Carlsbad, California. The officer responding was admitted to the room by Petitioner. Upon the officer's arrival, Jennifer Klapper was not breathing and had no pulse. Jennifer was lying on the bed closest to the door, and the other bed had not been slept in. The officer and Petitioner began two person cardiopulmonary resuscitation (CPR). The Carlsbad police officer noticed no chemical odor in the room, and

[1]This statement of facts is largely taken from the unpublished opinion of the California Court of Appeal, Fourth Appellate District, Division One, dated July 18, 1995, and the facts are entitled to a presumption of correctness under former 28 U.S.C. § 2254(d).

paid no attention to Jennifer's face.

Firemen and paramedics arrived shortly thereafter. Jennifer was moved from the bed to the floor. CPR was continued and other life-saving and monitoring procedures were undertaken, including the placing of an oxygen mask over Jennifer's mouth and nose. None of these emergency personnel smelled a chemical odor in the room. Jennifer was transported by ambulance to Tri-City Hospital, where further attempts were made to resuscitate her. All resuscitation attempts were to no avail. The emergency room doctor found no cause for Jennifer's death.

2. *Relationship Between Petitioner and Ms. Klapper*

Jennifer Klapper, age 20, became friends with Petitioner, a 28 year old resident physician, at the Medical library at Good Samaritan Hospital in Cincinnati, Ohio. The relationship between Jennifer and the Petitioner was not a romantic one. Jennifer had stated that she did not find Petitioner romantically desirable, and at the time of her death, was romantically involved in another relationship. Jennifer and her boyfriend had talked of marriage. Several times after reaching California, Jennifer called her boyfriend, including one call only hours before her death. During the phone conversations, Jennifer told her boyfriend that she loved and missed him.

Petitioner had traveled to California to attend a class reunion, and asked Jennifer if she wanted to along. Jennifer discussed the trip with her boyfriend, explained her relationship with Petitioner was merely a friendship, and expressed reluctance to go on the trip because, among other reasons, she would be away from her boyfriend. Jennifer had expressed to another friend that she was uncomfortable about going to California with

Petitioner, since she did not know what he expected. Jennifer stated to that friend that she did not find Petitioner physically attractive and did not intend to have a physical relationship with him. Jennifer's sister also overheard a telephone conversation in which Jennifer told petitioner that they were just friends and if he expected to have a physical relationship while on the trip, she would have to cancel her plans to go.

3. Physical Findings and Cause of Death

The emergency room physician was unable to determine why Ms. Klapper had suddenly died. Several hours after her death, Ms. Klapper's body was examined by a coroner's investigator. The investigator noticed the lycra pants Ms. Klapper was wearing were on inside out. Jennifer was wearing jewelry, including an earring in her pierced right earlobe, but no earring in the pierced left earlobe. The investigator noticed scratches on Jennifer's face including a half moon scratch on her left cheek.

The coroner's investigator also examined Room 224 at the All-star Inn. The trash can in the room contained a beer can, a fuzzy navel club mixed drink carton, and a Styrofoam cup containing a yellowish liquid. None of the items had an odor except that of alcohol.

An autopsy was performed on Ms. Klapper's body by Forensic Pathologist, Dr. Leena Jariwala. The doctor found numerous abrasions and bruises on Jennifer's face, including pink or red abrasions on her upper and lower right eyelids, on her right chin, on her left cheek, and on the tip of her nose. The doctor concluded, because it appeared these injuries resulted in bleeding, they were inflicted before Ms. Klapper's heart stopped beating. It was the opinion of Dr. Jariwala and the emergency room physician who treated Ms. Klapper that these injuries were not

associated with the application of CPR. The firemen and paramedics who administered medical aid to Ms. Klapper did not believe any of the equipment used could cause the injuries to her face, nor had they seen such injuries caused by CPR.

The autopsy also revealed a hemorrhage in Ms. Klapper's right temporal bone, which injury was not life threatening. An examination of swabs taken from Ms. Klapper's vagina indicated she had sexual intercourse relatively close to the time of her death. No vaginal injuries were detected.

After completing the autopsy, Dr. Jariwala could find no cause of death. Dr. Jariwala had Jennifer's brain examined by a team of nueropathalogists, who found no abnormalities. Toxicological tests were performed on body fluid samples taken from Jennifer. Drug testing produced only one anomalous result. The tests indicated 24 micrograms of chloroform in Jennifer's blood, 7 micrograms of chloroform per gram of her liver tissue and 17 micrograms of chloroform per milliliter of her gastric contents. No chloroform was found in the urine sample. Based on the toxicological findings, Dr. Jariwala concluded the cause of death was chloroform intoxication.

4. *Chloroform Poisoning*

Dr. Lucien Morris. an eminent anesthesiologist with extensive practical and experimental knowledge of chloroform, explained the history and nature of chloroform. Death can occur from the inhalation of chloroform in several ways. One is a "relative overdose". A lethal relative overdose occurs when a relatively small amount of chloroform is suddenly inhaled. The concentration of chloroform rises quickly, causing disruption of electrical activity in the heart. The amount of chloroform required to cause a relative overdose is very small.

Death may also result from a "frank overdose" of inhaled chloroform.. A frank overdose occurs when a large amount of chloroform is inhaled. Such inhalation causes a depression of several body systems, including the circulatory and respiratory systems to the extent that death can result.

Dr. Morris reviewed the medical, toxicological, and police reports in this case. He concluded that assuming chloroform was administered to Jennifer in the motel room, it was possible its smell dissipated before the arrival of the police. Dr. Morris concluded Jennifer's death resulted from a relative overdose of inhaled chloroform.

5. *Petitioner's Statements.*

Petitioner's statement to the paramedics at the All-star Inn, was that he had gone to the bathroom, and while in the bathroom he heard a cry or moan and then a 'thud" as if someone had fallen. Petitioner returned to the room and found Jennifer on the floor. At that time, Petitioner did not tell the paramedics or police that the two had sexual intercourse that night.

Later that morning at the hospital, Petitioner talked with other officers, and repeated his rendition of the facts involving finding Jennifer on the floor of the motel room. Petitioner told the officers that he had examined Jennifer, found no pulse, and started CPR. He then left the room, went to the motel office, and asked the clerk to call 911. Petitioner told the officers he ran back to the room, discovered he had locked himself out, returned to the office to get another key, and return to the room. Petitioner stated he did not know why he did not use the telephone in the motel room to call 911. Petitioner did tell these officers that be and Jennifer had sexual intercourse that evening, and that they were just friends. Later that morning, back at the All-star Inn,

Petitioner spoke with other officers. Petitioner told these officers that be and Jennifer had been to a taping of the Johnny Carson Show, they had a pizza, bought some alcoholic beverages in Burbank, California and then drove to Carlsbad. Petitioner and Jennifer were going to stay at a campsite at San Elijo State Beach, but arrived instead at the All-star Inn at about 11:30 p.m. There, they watched the show they had seen taped earlier in the day. Jennifer complained of dizziness and headaches, and Petitioner told the officers Jennifer had a history of headaches. Petitioner then again restated his version of events regarding finding Jennifer on the floor, administering CPR, leaving the room, and locking himself out.

Petitioner also told the officers that the paramedics arrived between 5 and 15 minutes after he left the room. Petitioner stated he told paramedics he would follow them to the hospital, but stated he returned to the room to get information about reaching Jennifer's family and about 5 minutes later departed. Petitioner stated this was only an estimate of time, that he was in a frenzy and stayed at the motel for a few minutes to catch his breath. Petitioner stated be told the paramedics he would follow them to the hospital, but meant he would follow later and not immediately. Petitioner told the officers that he and Jennifer had intercourse that night, that he had a beer and mixed drink that night, and that Jennifer had several sips of the drink. Petitioner told the officers that he did not know what had killed Jennifer, and that they had been together all day and all evening except for short times when she used the telephone.

By October, 1991, coroner's investigators had determined Jennifer's death was the result of chloroform intoxication. Petitioner was interviewed in New Jersey by Carlsbad police detectives on October 23, 1991. The officers sketched a theory for Petitioner that Petitioner had wanted to have sex with

Jennifer, used a little too much chloroform, resulting in her death. Petitioner denied having any knowledge of chloroform, having ever used chloroform, and killing Jennifer. Petitioner stated that the act of intercourse that evening was consensual. Petitioner explained to the officers that he and Jennifer had a reservation at a camp ground, but were scheduled to arrive at 7 or 8:00 p.m. Petitioner had told Jennifer that they were not going to make it to the campsite in time, so Petitioner found a motel with a low rate since the two were trying to save money, where Petitioner registered as a single and obtained a single room with two beds. Petitioner stated that Jennifer agreed with this arrangement.

6. *Check-In Procedures at San Elijo State Beach*

Petitioner had a reservation for a camp site at the San Elijo State Beach for August 15-17, but records indicated he did not appear to claim the camp site. The entrance booth at the park closes between 10:30 and 11:00 p.m., but the park remains open. A note is placed in the window of the booth telling late comers which campsite has been assigned to them. Nothing on the park's recorded telephone message stated the reservations of late arriving campers would not be honored.

B. ***Defense Case***

1. *Rapist Profile and Character Evidence*

Dr. Cynthia Stout, a marriage, family and child counselor, and Dr. Edward Conolley, a clinical psychologist, tested and took a history of Petitioner. Both testified that a profile existed for the majority of rapists and they found Petitioner did not fit that profile. Petitioner also offered a series of witnesses who testified to his compassion. empathy, trustworthiness, and other traits of good character.

2. *Medical Testimony*

Dr. George Schwartz, a Board certified emergency room physician, reviewed the medical and police reports as well as the testimony in the case and researched the literature concerning chloroform. Dr. Schwartz agreed with most of the conclusions reached by the prosecution experts concerning chloroform, including that Jennifer died from an adverse reaction to the presence of chloroform in her body. Dr. Schwartz, however, believed Jennifer had ingested rather than inhaled the chloroform as had been concluded by the prosecution's expert. Dr. Schwartz's calculations, based on the autopsy report, led him to believe that there was more than half a teaspoon of chloroform in Jennifer's stomach contents at the time of her death. This amount was consistent with ingestion of the substance but not inhalation. Dr. Schwartz indicated that, while still unusual, chloroform's use to produce giddiness for recreational purposes was on the rise. Chloroform was both ingested and inhaled for such purpose.

Dr. Schwartz also believed that the injuries to Jennifer's face were consistent with those which occurred during attempts at resuscitation. The doctor disagreed with the prosecution's expert testimony that since the injuries had bled they necessarily occurred before death. Dr. Schwartz believed CPR could have created enough circulation to cause blood seepage into post mortem facial injuries.

Dr. Schwartz concluded, given the electrical activity noted by the paramedics in Jennifer's heart, death must have occurred from 5 to 30 minutes before the paramedics arrived. Dr. Schwartz believed the smell of chloroform would persist in a closed room for 8 to 12 hours and would have been smelled by emergency personnel when they arrived. Oral ingestion would not have caused a great deal of vaporization, and the doctor believed that

attempts at getting rid of the smell could be successful in a relatively short period of time.

4. Petitioner's Testimony

Petitioner testified in his own defense, stating he met Jennifer at the library at Good Samaritan Hospital in Cincinnati, Ohio. Eventually Jennifer was laid off from the library. However the two maintained a relationship. Petitioner and Jennifer went out on seven "formal dates", including going out for dinner, playing tennis, and simply going for walks. Petitioner had kissed her for the first time in April, 1991, and in May, 1991, after bowling the two kissed and "cuddled" in the back seat of Petitioner's car.

In March, 1991, the two began discussing a trip to California. Petitioner told Jennifer he was able to purchase a round trip ticket to Los Angeles that would allow two persons to fly for $189. In June, 1991, Petitioner left Ohio and moved to New Jersey. The two communicated by telephone and continued discussing the California trip. Eventually, the two agreed to come to California and Petitioner arrived before Jennifer and picked her up on August 11, 1991 at the airport.

Petitioner and Jennifer went to Petitioner's parents' house, where Petitioner slept on the living room couch and Jennifer slept in one of the bedrooms. The two spent several days seeing the sites. On August 15 at 4:00 p.m.. Petitioner and Jennifer watched the taping of the Johnny Carson show. The taping lasted about 2½ hours. When it was over, the two departed with camping gear for the San Elijo State Beach campground. On the way, they stopped for dinner and picked up a beer and a fuzzy navel mixed drink. It was 9:30 p.m. before the two left for the campground.

Petitioner and Jennifer stopped for gas, and Petitioner called the campground. He was told visitors were not accepted after 10:30 p.m.. Since it was already after 10:30 p.m. and they did not know how to get to the campsite, they decided to seek other accommodations for the night. Petitioner registered at the All-star Inn. The pair settled into the room at about 11:30 p.m., and Jennifer turned on the television to watch the Johnny Carson Show they had seen taped earlier in the day. Jennifer lay on one of the two beds, and Petitioner walked between the beds, handed her the fuzzy navel drink and turned off the light on the nightstand. Jennifer moved over on the bed, indicating Petitioner should lie down next to her. Petitioner put his arm around Jennifer and the two began to "cuddle". The two talked, kissed, and eventually had intercourse. Before having sexual relations Petitioner asked Jennifer if she was using any type of birth control method. Jennifer stated she was on the pill.

Petitioner again testified regarding the sequence of events leading up to Jennifer's death, consistent with his earlier statements to police. Petitioner stated that he was told by the fire captain they would be taking Jennifer to Scripps Hospital in Encinitas, and drove there. Upon arriving, Petitioner was told that Jennifer had not been brought there, was told she might have been taken to Tri-City Hospital, and was given directions to that location. Petitioner went to Tri-City Hospital and found Jennifer was there and had been pronounced dead.

C. *Prosecution Rebuttal*

1. *Character Evidence*

The prosecution offered the testimony of three doctors who had worked with Petitioner. The doctors did not believe Petitioner was trustworthy and did not believe Petitioner had a

good reputation for trustworthiness.

2. *Evidence Concerning Birth Control Pills*

Jennifer's gynecologist testified that in August 1991 Jennifer complained of menstrual spotting between her periods. On August 2, 1991, the doctor, without Jennifer's request that he do so, prescribed a cycle of birth control pills to treat the problem. The doctor had never before prescribed birth control pills for Jennifer. Jennifer was given two packages of pills, and she was to begin taking the pills on August 18, 1991, two days after her death. In Jennifer's belongings turned over to her father after her death was a single packet of birth control pills with none of the pills missing.

3. *Rapist Profile*

Forensic psychiatrist Dr. Melvin Goldzband testified there was no such thing as a rapist profile which can predict whether a person will commit rape.

4. *Recreational Use of Chloroform*

Dr. Bushong, the emergency room doctor who treated Jennifer, stated that he had never heard of the use of chloroform for recreational purposes, and had never heard of any patient at his hospital, other than Jennifer, who had died from an overdose of chloroform.

5. *Chloroform Intoxication*

Dr. Graham Jones, a pharmacologist and toxicologist familiar with chloroform, concluded Dr. Schwartz was mistaken when he concluded Jennifer had ingested rather than inhaled the

chloroform found in her system. Dr. Jones demonstrated mathematically that Dr. Schwartz was mistaken when he concluded there was from a half to one teaspoon of chloroform in Jennifer's gastric contents at the time of her death, noting the actual amount of chloroform present was about one thousand part of one teaspoon. Dr. Jones concluded that Jennifer did not ingest chloroform, and that the amount of chloroform found in Jennifer's body fluids was consistent with those of a person who died from a fairly quick inhalation of a fairly high concentration of chloroform. Dr. Jones testified it was certainty possible for the odor of chloroform to dissipate in half hour to an hour.

D. Defense Surrebuttal

Dr. Schwartz agreed he had made an error concerning the amount of chloroform in Jennifer's gastric contents. Dr. Schwartz still believed it was possible Jennifer had ingested rather than inhaled chloroform. Dr. Schwartz believed other causes of death were possible, including aspiration, noting aspirated material was found in Jennifer's lungs.

The defense also recalled one of its psychological experts who stated the individual who would commit the crimes in this case would have signs of mental disturbance that would have been detected in testing, and that Petitioner did not fit the psychological profile of a rapist.

E. Prosecution Surrebuttal

Dr. Jariwala testified that Jennifer did not die from aspiration, and again discounted all possible causes of death except chloroform intoxication.

The second packet of birth control pills given to Jennifer

by her gynecologist was found in a cabinet in the bathroom used by Jennifer at her home.

Discussion

The Petition raises six claims for relief: (1) insufficiency of the evidence; (2) violation of the Fifth Amendment; (3) violation of due process by instructional error; (4) violation of due process in evidentiary errors; (5) ineffective assistance of counsel; and (6) unconstitutionality of sentence. Before addressing the substance of Petitioner's claims, however, the Court will address Respondent's claims that the Petition should be dismissed because it is not signed under penalty of perjury by Petitioner, and that the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), signed into law on April 24, 1996, applies to this case.

A. Respondent's Claims Regarding Signature of the Petition and Applicability of AEDPA

1. *The Petition Should Not Be Dismissed Based Upon Lack of Petitioner's Verification.*

The Petition in this case included a verification, signed by Petitioner's counsel Charles M. Sevilla under penalty of perjury, that Mr. Sevilla is authorized to file the Petition on Petitioner's behalf, and that Mr. Sevilla believes and alleges that the contents of the Petition are true.

Pursuant to 28 U.S.C. Section 2242, an "Ia]pplication for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended *or by someone acting in his behalf."* (Emphasis added); *see also* Rule 2(c) of the Rules Governing § 2254 Cases, Advisory Committee Notes ("the

petition must be signed and sworn to by the petitioner (or someone acting in his behalf)."). The verification provided by Petitioner's counsel in this case is sufficient to allow the Petitioner to proceed.

2. *Applicability of AEDPA.*

Respondent argues that the AEDPA applies to this case, and limits the Court's ability to grant any habeas relief based upon the Petition. Under Section 104 of the AEDPA.

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Respondent argues that this new standard for habeas corpus relief is to be applied retroactively to all pending eases, including the current Petition.

In Jeffries v. Wood, 1996 WL 730493 (9th Cir. 1996), the Ninth Circuit held that amendments to Chapter 153 of Title 28 of the United States Code contained in Title I of the Act do

not apply to cases filed in the federal courts of this Circuit prior to the Act's effective date of April 24, 1996." Because the standard set forth above is an amendment to Chapter 153, and is contained in Title I of the Act, it does not apply retroactively to this case which was filed on April 12, 1996, twelve days prior to the effective date of the Act.

The Court notes, however, that the AEDPA significantly curtails the scope of federal habeas corpus review. If Petitioner is not entitled to relief under the more lenient standards of the pre-1996 case law, the Petition would similarly be denied under the new standards.

B. Petitioner's Claims for Relief

1. *Insufficiency of the Evidence*

Petitioner's claim of insufficiency of the evidence contains two elements. First, Petitioner claims that there was no factual basis upon which a reasonable jury could have found him guilty beyond a reasonable doubt of the murder, rape, and rape special circumstance. Second, Petitioner claims that his rights to due process were violated by the presentation by the prosecution of false, contaminated toxicological evidence. Each of these claims are reviewed individually below.

(a) General Claim of Insufficiency of the Evidence.

A state prisoner who alleges that the evidence presented at trial was insufficient to lead a rational trier of fact to find guilt beyond a reasonable doubt has stated a federal constitutional claim. Jackson v. Virginia, 443 U.S. 307, 321 (1979). Where a state prisoner claims, under 28 U.S.C. Section 2254, that he is entitled to relief due to the insufficiency of the evidence, the

relevant inquiry is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." United States v. Riggins 40 F.3d 1055, 1057 (9th Cir. 1994), quoting Jackson, 443 U.S. at 319).

Upon examining Petitioner's claim of insufficiency of the evidence, the California Court of Appeal applied the correct legal standard. It found that the evidence amply supported the conclusion that Jennifer died of chloroform inhalation. It further found, after rejecting the possibility of post-mortem contamination of the body fluid samples, that the presence of chloroform by any method other than its administration by Petitioner "becomes difficult to accept." Finally, the Court determined the evidence was sufficient to find appellant applied the chloroform for the purposes of raping Jennifer, and therefore that he killed her in the commission of a rape.

Assuming for the sake of argument that Jennifer died of chloroform inhalation,[2] Petitioner argues that the evidence is in no way sufficient to support a finding that the chloroform was administered by Petitioner in an effort to rape Jennifer. However, viewing the evidence in the light most favorable to the State, the evidence was sufficient to allow a rational trier of fact to find Petitioner guilty beyond a reasonable doubt of murder in

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[2] In part B.1 .b below, Petitioner's argument regarding the presentation of "false, contaminated toxicological evidence" sets forth a theory that the chloroform found in Jennifer's body fluids was the result of laboratory contamination, therefore disputing the finding that Jennifer died from chloroform intoxication. However, for purposes of the general argument regarding insufficiency of the evidence only, Petitioner accepts the finding that Jennifer died of chloroform intoxication.

the commission of a rape.

The only explanation for the presence of chloroform in Jennifer's body offered by the defense at trial, ether than possible post-mortem contamination of the body fluid samples, was that Jennifer self-administered the chloroform. However, there was no evidence presented at trial that Jennifer had voluntarily or intentionally inhaled chloroform. Given the testimony of Dr. Bushong that none of the emergency room literature mentioned chloroform as a recreational substance, and that he had never seen a case of chloroform intoxication, the jury could reasonably have concluded that Jennifer did not inhale the chloroform for a recreational purpose. Additionally, evidence was presented at trial regarding the presence of scratches and abrasions on Jennifer1s face, which were not caused by the administration of CPR or other lifesaving methods by emergency personnel. It was also shown that Jennifer had sexual intercourse at some point near the time of her death, despite evidence that she did not have a physical relationship with Petitioner and was not physically attracted to Petitioner. Finally, the pants Jennifer was wearing when police arrived were inside out. All of these facts are sufficient to support a finding that Petitioner killed Jennifer during the commission of a rape.

Petitioner in his traverse makes several arguments regarding the proper inferences to be drawn from the evidence presented in this case. However, these arguments regarding the voluntary use of chloroform by Jennifer, the consensual nature of sexual contact between Petitioner and Jennifer, the inability of Petitioner to accomplish both the chloroform poisoning and rape given the estimate timing of Jennifer's death, and the source of scratches on Jennifer's face were all made at trial and rejected by the trier of fact. Upon review of the record, the evidence was sufficient to support the finding that Petitioner

killed Jennifer in the commission of a rape under the standard set forth in Jackson v. Virginia. Therefore. Petitioner's claim of insufficiency of the evidence does not justify relief on his Petition.

b. Claim of Presentation of False, Contaminated Toxicological Evidence.

Petitioner argues that he was denied due process of law by the presentation of false, contaminated toxicological evidence by the prosecution at trial. In support of his proposition that such claim supports habeas relief, Petitioner cites to United States v. Young. 17 F.3d 1201, 1203-04 (9th Cir. 1994). In Young, the Ninth Circuit heard an appeal by the appellant of his federal conviction and sentence for drug trafficking. Appellant claimed that his conviction was obtained by the "knowing use of perjured testimony." Specifically, the prosecutor presented testimony from a witness that certain notebooks and "Chem Lab" business cards were found taped under the dashboard of appellant's truck. The witness testified that although he did not personally search appellant's truck, he was there when the other officer searched the truck, and the other officer told him that the notebooks were taped under the dashboard. The notebooks contained writings which were interpreted by another government witness as relating to methamphetamine manufacture. After the trial, appellant's lawyer found out that the officer who found the notebooks *had not* found the notebooks and "Chem Lab" cards taped under the dashboard of appellant's truck, but rather she found them in a paper hag in the cab of the truck. At the hearing on appellant's motion for new trial, this officer testified she had told the prosecutor where she found the notebooks during the trial, before the other witness testified.

Based upon this evidence, the Ninth Circuit found that appellant's conviction was based in part on false evidence. The

Court therefore reversed the trial court, and found the petitioner was entitled to a new trial. "A conviction based in part on false evidence, even false evidence presented in good faith, hardly comports with fundamental fairness. Thus, even if the government unwittingly presents false evidence, a defendant is entitled to a new trial 'if there is a reasonable probability that [without the evidence] the result of the proceeding would have been different.'" Young, 17 F.3d at 1203-04 (quoting United States v. Endicott, 869 F.2d 452,455 (9th Cir. 1989)).

Young, however, is not authority for the granting of habeas relief based upon the present Petition. First, Young is a direct appeal of a denial of a motion for new trial based upon a federal conviction. As such, it does not address the constitutional basis of a claim that the presentation of false evidence was a violation of due process, and does not hold that the presentation of false evidence violates due process. Second, Petitioner has made no showing that the toxicological evidence in this case was "false." Petitioner's arguments merely continue his attempt to disprove the prosecution's theory of the case. However, "federal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution-- not to correct errors of fact." Herrera v. Collins, 506 U.S. 390, 400 (1993). Therefore. Petitioner's argument that false evidence was presented at trial does not justify habeas relief.

2. *Petitioner's Miranda Claims*

Petitioner raises two claims with regard to alleged violations of his rights under Miranda v. Arizona, 384 U.S. 436 (1966). First, Petitioner claims that when he was questioned by officers in New Jersey on October23, 1991, he was "in custody" for purposes of Miranda and should have been advised of his rights thereunder, such that any statements taken from him should have

been excluded at trial. Second, Petitioner claims that his due process rights were violated when a tape recording of the interview was played for the jury, a transcript of the interview was given to the jury, and the prosecution exploited inconsistencies in statements made during the interview.

(a) Claim of Miranda Violation

The following facts are relevant to the "in custody" inquiry regarding the alleged Miranda violation.[3] After his initial interview with the Carlsbad Police Department on August 16, 1991. Petitioner returned to his home in New Jersey. On the morning of October 23, 1991, two officers from the Carlsbad Police Department arrived at the New Jersey complex where Petitioner lived, along with Sergeant Gannon of the Morris County New Jersey prosecutor's office. All of the officers were in plain clothes, and their car was unmarked. The officers believed Petitioner was a prime suspect in Jennifer's murder.

As the officers drove up to the complex, they saw Petitioner walking toward a parking lot. One of the Carlsbad officers got out of the car and asked Petitioner if he would go with the officers to an office in town to talk. Petitioner agreed to go, but wanted to call the hospital, whereupon the officer suggested Petitioner call from the office. Petitioner was told he would be brought back after the interview. On the ride to the office, Petitioner and the officers discussed the weather, the area in which Petitioner lived, the officers' flight from California, and other topics not related to the

[3] These facts are taken from the July 18, 1995 unpublished decision of the California Court of Appeal, and are entitled to a presumption of correctness under former 28 U.S.C. § 2254(d).

homicide. Petitioner asked how long the interview would take, and was told it would take between one and two hours. No force or suggestion of force was used in contacting Petitioner, and no restraints were employed by the officers in transporting Petitioner.

Petitioner was taken to the prosecutor's office, which was in an office building. He was not taken to a police station. Petitioner asked and was allowed to make several telephone calls privately from a lieutenant's office. Petitioner was offered food and use of the facilities, and then was interrogated by the Carlsbad Police officers in an interview room. The officers told Petitioner the door to the room was unlocked and that he could leave at any time. Petitioner was also told he would be given a ride home.

The officers obtained some background information from Petitioner, and then told him if he had anything to do with Jennifer's death he should tell them about it. The clear tone of the officers' questions and comments was that the officers believed Petitioner was involved in causing Jennifer's death. Petitioner told the officers he hail nothing to do with Jennifer's death.

The officers went on to tell Petitioner they believed he was responsible for Jennifer's death, but that her death was probably an accident. Petitioner asked the officers what evidence they bad, where upon the officers said they knew what happened and it was time Petitioner told the truth. The officers told Petitioner Jennifer died of chloroform intoxication.

The interview thereafter became a sparing session, with the officers explaining how they believed Petitioner caused Jennifer's death, and with Petitioner denying he caused Jennifer's death. Petitioner recounted for the officers his version of what

happened on the trip and the night Jennifer died.

At one point Petitioner requested that the interview stop so he could call his family. Petitioner was allowed to make this telephone call, and thereafter Petitioner stated he wished to make no further statements. The officers told Petitioner they would take him home and would continue working on the case. The interview then ended, and Petitioner was driven home by one of the Carlsbad officers.

At no time was Petitioner told he was under arrest. Petitioner was told on several occasions he was not under arrest, that he was free to go at any time, and that he would be given a ride either home or to work.

Warnings under Miranda v. Arizona are required to be given prior to "custodial interrogation." Custodial interrogation is defined as "questioning initiated by law enforcement officers after a person has been taken into custody otherwise deprived of his freedom of action in any significant way." Miranda, 384 U.S. at 444. In a noncustodial setting, where the person being questioned has not been formally arrested or otherwise formally detained, "Miranda warnings are require4 only where there has been such a restriction on a person's freedom as to render him 'in custody.'" Oregon v. Mathiason, 429 U.S. 492, 495 (1977). The Court must examine all of the circumstances surrounding the interrogation, but 'the ultimate inquiry is simply whether there [was] a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest'." Stansbury v. California, 114 S. Ct. 1526, 1529(1994) (quoting California v. Beheler. 463 U.S. 1121, 1125 (1983). An officer's knowledge or belief regarding the guilt of the person being interviewed are relevant only insofar as they are conveyed by word or deed to the person being interviewed, and to the extent those beliefs "would affect

how a person in the position of the individual being questioned would gauge the breadth of his or her 'freedom of action'." Stansbury, 114 S. Ct. at 1530.

The factual determinations of the state court regarding the circumstances surrounding the interrogation are entitled to a presumption of correctness under former Section 2254(d). However, the ultimate determination of whether a person is "in custody" for purposes of requiring Miranda warnings is a mixed question of fact and law which must be reviewed by the federal court independently, based upon the facts. Thompson v Keohane, 116 S. Ct. 457, 465 (1995).

It cannot be said that Petitioner's interview in this case took place under circumstances as to lead a reasonable person to believe that he was no longer free to leave. Petitioner stresses that he told he was free to go prior to the point in time the accusatory interrogation began, and that once the pointed interrogation began, a reasonable person would not have believed he was still free to go. However, it is clear that when Petitioner expressed a desire to take a break from the questioning to call his family, he was permitted to make the telephone call. Thereafter, the questioning ended upon Petitioner's request, and he was given a ride back home. Under all of the circumstances, it cannot be said that the circumstances surrounding the interview were so coercive as to render the Petitioner "in custody"' and require the giving of Miranda warnings.

Therefore, Petitioner's argument that his Miranda rights were violated by the October 23, 1991 interview does not justify relief upon the Petition.

(b) Introduction of Tape Statements by Petitioner

Petitioner argues his right to due process was violated by the introduction into evidence of his statements taken during the interview on October 23, 1991. During the testimony of the interrogating officers, the unedited tape of the October 23, 1991, interview was played and the jurors were provided transcripts of the recording. The interview on October 23. 1991 was essentially a sparring session, with the officers expressing that belief in Petitioner's guilt, and his involvement in Jennifer's death. Petitioner argues that the playing of the tape recording, and the provision of the transcript of the interview to the jury was a highly prejudicial and inflammatory means of putting before the jury otherwise inadmissible opinions and statements of the chief investigating officer regarding petitioner's guilt. Petitioner argues that the introduction of the tape recorded interview, both individually and when combined with the alleged Miranda violation, violated Petitioner's right to due process.

Errors regarding state court evidentiary rulings ordinarily do not rise to the level of constitutional violations. Estelle v. McGuire, 502 U.S. 62 (1991). The category of errors which violate "fundamental fairness" so as to amount to a violation of due process is narrow. Id. at 72. The inquiry is whether the alleged error "so infused the trial with unfairness as to deny due process of law." Id. at 75 (quoting Lisenba v. California, 314 U.S. 219, 228 (1941). In this case, the jury was instructed and admonished that the officer's statements were not admitted for their truth, but only to be considered as giving meaning and context to the Petitioner's statements. Therefore, it is not at all clear that the introduction of the statements was erroneous. Even if the introduction of the statements was erroneous, it cannot be said that the introduction of the tape recorded interview or the transcript rises to the level of violating fundamental fairness. Therefore, Petitioner's argument that he was denied due process is not a sufficient basis for the granting of habeas relief on his

Petition.

3. Violation of Due Process by Instructional Error

Petitioner argues that his rights to due process were violated by the trial court's (a) failure to give lesser included offense instructions regarding rape; (b) the trial court's failure to give a proper reasonable doubt instruction.

(a) Failure to Give Lesser Included Offense Instruction Regarding Rape

Petitioner's jury was charged with instructions on rape. Petitioner also requested that the jury be given lesser included instructions regarding rape, which could have effected the special circumstance finding and liability for murder.

The Supreme Court has held that the failure to give a lesser included offense instruction in a capital case is constitutional error. Beck v. Alabama, 447 U.S. 625 (1980). With regard to non-capital cases, however, the Supreme Court has never held that the giving of a lesser included offense instruction is required under the Eighth Amendment. In Turner v. Marshall, 63 F.3d 807 (9th Cir. 1995), the court acknowledged that it is not settled whether Beck applies to non-capital cases. The Ninth Circuit has previously declined to find any constitutional error arising from the failure to instruct on a lesser included offense in a non-capital case. Bashor v. Risley, 730 F.2d 1228, 1240 (9th Cir. 1984). The court in Turner did not specifically hold that the failure to give a lesser included offense instruction would not amount to a constitutional error. However, the court stated that "any finding of constitutional error would create a new rule, inapplicable to the present case under

Teague ."[4] Turner, 63 F.3d 819.

Petitioner argues that requiring a trial court to give a requested lesser included offense instruction is not a new rule of due process law, such that Teague is not applicable. In addition, Petitioner argues that the giving of a lesser included offense instructions would be a "water shed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding" so as to fall under the exception in Teague. Asaffle v. Parks, 494 U.S. 484 (1990). These arguments, however, cannot be accepted given the Ninth Circuit finding to the contrary in Turner. Because the error asserted by Petitioner is not one of constitutional magnitude, the Petition cannot be granted based upon the trial court's falure to give lesser included offense instructions regarding rape.

(b) Reasonable Doubt Instruction.

Petitioner argues that his right to due process was violated by the trial court's instruction regarding reasonable doubt. The jury was instructed as follows:

> A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. This presumption places upon the People the burden of proving him guilty beyond a reasonable doubt.
>
> Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to

[4] Teague v. Lane, 489 U.S. 288 (1989).

> human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge.

Petitioner objects to the use by the trial court of the term "moral certainty" in relation to the definition of reasonable doubt, and argues that the use of the instruction above unconstitutionally diluted the reasonable doubt standard.

In Victor v. Nebraska, 114 S. Ct. 1239 (1994) the petitioner challenged the exact same jury instruction which was given in this case. Upon examination of the instruction, the Court found no constitutional error resulting from the use of the term "moral certainty." The Court stressed that the remainder of the instruction provided context to the "moral certainty" language, such that it was unlikely that the jury applied the reasonable doubt instruction to require proof of any anything less than due process requires. Id. at 1248.

The instruction given by the trial court in this case did not violate Petitioner's right to due process. Therefore, Petitioner's claim in this regard is not a proper basis for habeas relief.

(4) Violation of Due Process As a Result of Evidentiary Errors

Petitioner claims his right to due process was violated as a result of evidentiary errors by the trial court. First, Petitioner argues the trial court erred in admitting rebuttal evidence by the prosecution relating to his alleged lack of trustworthiness.

Petitioner asserts this error was exacerbated by limitations placed upon defense counsel in cross-examination of the rebuttal witnesses. Second, Petitioner argues the trial court erred in excluding inquiry regarding Jennifer's previous use of birth control methods.

(a) Rebuttal Evidence of Trustworthiness

The defense presented testimony of two psychological experts, who opined that there existed a rapist profile and that Petitioner did not fit that profile. To support this argument, Petitioner presented testimony by ten character witnesses regarding his character traits. Defense counsel elicited testimony regarding Petitioner's character traits, including that he was empathetic, unselfish, went out of his way to help others, was committed to medicine, was a good and caring doctor, was never unkind, never said a bad word about anyone, was never chauvinistic, never treated women as sex objects, was always respectful to women, had excellence of character, was a gentleman, courteous, sympathetic, and a good friend. One of the character witnesses was a doctor who gained his opinion of Petitioner while supervising him in a hospital setting.

The tenth character witness was asked by defense counsel if she found appellant loving and compassionate. In response the witness testified "He is a loving, compassionate person, very caring, sensitive, trustworthy. Very respectful person, very polite. Very gracious and very helpful." Neither counsel asked that any portion of the answer be stricken as nonresponsive.

The prosecution thereafter indicated an intent to present rebuttal evidence regarding Petitioner's lack of trustworthiness. Defense counsel argued he had never raised the issue of trustworthiness in his questioning, and that the witness who

stated Petitioner was trustworthy simply "blurted" out the word. Defense counsel argued that the witness's testimony that Petitioner was trustworthy was nonresponsive, and suggested that it be stricken. The trial court found the defense had elicited testimony regarding trustworthiness, entitling the prosecution to rebut such evidence.

The prosecution presented testimony by Dr. Dumbauld and Dr. Epperly, both of whom supervised Petitioner in a residency program. Dr. Dumbauld testified "I had a difficult time trusting [petitioner] from a physician's standpoint," and testified that Petitioner did not have a good reputation for trustworthiness. Dr. Epperly testified "The reputation was that if he told you about something, you should check and make sure it was the way that he presented it to you." Petitioner responded to this rebuttal evidence through the testimony of several more character witnesses, including doctors with whom Petitioner had worked. These doctors indicated in the strongest terms that appellant was trustworthy. The prosecution offered additional rebuttal evidence thereafter from a third physician, Dr. Pilger, who had supervised Petitioner in a resident program, who opined that Petitioner was not trustworthy.

During the defense cross-examination of Dr. Dunibauld, who testified for the prosecution regarding Petitioner's alleged lack of trustworthiness, defense counsel offered an evaluation of Petitioner written by Dr. Pilger. Defense counsel's purpose in offering this evaluation was to try to show that Dr. Dumbauld's opinion of Petitioner was largely based upon Dr. Pilger's one bad evaluation. The trial court allowed defense counsel to question Dr. Dumbauld generally on cross-examination about the report but excluded efforts by the defense to inquire regarding specifics of the report. Dr. Dumbauld testified that the reports did not play any significant part in his evaluation of Petitioner's

trustworthiness. Petitioner argues he was not permitted to show bias during the cross-examination, in violation of his right to due process and in violation of the Confrontation Clause.

As discussed above in section B.2.b, in order to show a violation of due process, Petitioner must show some error which infused the trial with unfairness. It cannot be said that the trial court1s decision to allow rebuttal evidence regarding Petitioner's trustworthiness is an error rising to the level of violation of due process. Petitioner presented extensive character evidence, and opened the door to the testimony of the doctors regarding lack of trustworthiness. Petitioner was also permitted ample opportunity to provide evidence in rebuttal to the prosecution's testimony regarding his lack of trustworthiness. There was likely no error at all, and there certainly was no error in this regard rising to the level of a violation of due process.

With regard to the exclusion of defense inquiry on cross-examination regarding the particulars of the evaluations, a trial court may impose reasonable limits upon cross-examination, including inquiry regarding possible bias. Olden v. Kentucky, 488 U.S. 227, 232 (1988). Where the limitation is unreasonable, however, there may be a violation of the Confrontation Clause resulting from the limitation. Id. In this case, the trial court found that allowing specific inquiry regarding the content of the evaluation of Dr. Pilger was barred as a specific instance of conduct or misconduct. The trial court did permit defense counsel to make general inquiry regarding the evaluation. Also during cross-examination, defense counsel impeached Dr. Dumbauld by showing he gave Petitioner a recommendation without mentioning any lack of trustworthiness. Petitioner was also given the opportunity and did present further character witnesses to rebut the prosecution's claim that he lacked trustworthiness. Upon a review of the record, it cannot be said that the limitation

on cross-examination imposed by the trial court was in any way unreasonable so as to violate Petitioner's rights.

Petitioner's claim that he was denied due process as a result of the admission of evidence by the prosecution of Petitioner's lack of trustworthiness, and also as a result of the limitation of cross-examination of Dr. Dumbauld, are not bases for habeas relief.

(b) Evidence of Birth Control

During Petitioner's testimony, he stated that before having intercourse with Jennifer he asked if she was using any type of birth control, and she responded she was on the pill. In rebuttal, the prosecution presented testimony from Jennifer's gynecologist that he prescribed birth control pills to Jennifer, without being requested to do so, for the treatment of menstrual spotting. Jennifer was to have begun taking the pills August 18, two days after her death. Jennifer's gynecologist testified this was the first time he prescribed birth control pills for Jennifer.

In response, Petitioner sought to elicit testimony from Jennifer's gynecologist that in December 1989 Jennifer told him she was sexually active and using "rubber and rhythm methods" of birth control. Defense counsel argued this evidence that Jennifer was knowledgeable about birth control methods was relevant to her willingness to consent to sexual intercourse with Petitioner. The trial court found the testimony inadmissible pursuant to Section 1103 of the California Evidence Code as evidence of prior sexual conduct. The court noted it was Petitioner's testimony that raised the issue of Jennifer's use of birth control pills, and that the prosecution had narrowly responded to the Petitioner's testimony in this regard by introducing evidence by Jennifer's gynecologist that he had

prescribed the pills for a medical problem, and that she had not started taking the pills. The Court also found the inquiry inappropriate under Section 352 of the Evidence Code since it would be time consuming, and there would be a danger of confusion and potential prejudice.[3]

The right to confront witnesses under the Sixth Amendment includes the right to cross-examination. Davis v. Alaska, 415 U.S. 308, 315-16 (1974). It also includes the right to present relevant evidence. Michigan v. Lucas, 111 S. Ct. 1743, 1746-47(1991). It is within the discretion of the trial court, however, to exclude irrelevant evidence, and to determine which issues are relevant. United States v. Torres, 937 F.2d 1469, 1473 (9th Cir. 1991).

"Even relevant evidence may be excluded in certain circumstances. The right to present relevant testimony 'may. in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process'." Wood v. Alaska, 957 F.2d 1544, 1549 (9thCir. 1992) (quoting Chambers v. Mississippi, 410 U.S. 284, 295 (1973)). For example, the Supreme Court has recognized that a state has a legitimate interest in protecting rape victims against unwarranted invasions of privacy and harassment regarding their sexual conduct. Wood, 957 F.2d at 1549.

In Wood, the trial court excluded evidence that the rape victim had posed for Penthouse and acted in pornographic

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[3] The trial court noted, from prior discussion between the parties and the court, that it was aware the prosecution had evidence that Jennifer had engaged in sexual intercourse with a previous boyfriend, had been traumatized by the experience, and bad indicated she would have no further encounters. The court decided it was best to confine the evidence regarding Jennifer's sexual history to that already presented.

movies. The evidence was excluded under Alaska's rape shield law which prohibited the presentation of evidence of prior sexual conduct of a rape victim. On habeas review, the Ninth Circuit engaged in a two-part inquiry: first, it determined whether the excluded evidence was relevant. Second, the court examined whether other legitimate interests outweighed petitioner's interest in presenting the evidence. The court determined that a finding that petitioner's rights under the Sixth Amendment had been violated was appropriate only if the trial court abused its discretion. Id. at 1550.

In the present ease, it is not at all clear that the evidence regarding Jennifer's knowledge about birth control methods is relevant to the issue presented in the case -- whether Jennifer consented to sexual intercourse with Petitioner. "[A] rape victim's sexual history with others only goes to show a generalized attitude toward sex that says little if anything about the victim's attitude toward sex with the defendant...." Wood, 957 F.2d at 1551. In this case, Jennifer's prior sexual history was in no way probative of whether she consented to sexual intercourse with Petitioner. Therefore, the evidence was properly excluded as irrelevant. Even if the evidence was of some marginal relevance, it cannot be said the trial court abused its discretion in excluding the evidence given the potential for confusion of the issues and prejudice.

The exclusion of evidence regarding Jennifer's prior sexual history and/or knowledge end use of birth control did not violate Petitioner's rights under the Sixth Amendment. Therefore, Petitioner's claim in this regard is not a basis for habeas relief.

(4) Ineffective Assistance of Counsel Claim

Petitioner claims he was denied ineffective assistance of

trial counsel in four particulars: (a) counsel failed to appropriately object to the playing of the tape of the October 23, 1991 interrogation; (b) counsel failed to object to certain statements made by the prosecution in closing argument; (c) counsel failed to object to the asking of guilt-assuming hypotheticals by the prosecution; and (d) counsel failed to object to the officer's testimony that on hearing of Jennifer's death, Petitioner appeared to be trying to make himself cry.

In order to prevail on his claim of ineffective assistance of trial counsel, Petitioner must "overcome a strong presumption that counsel 'rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment,' and establish that [counsel's] performance was 'outside the wide range of professionally competent assistance'." Clabournie v. Lewis, 64 F.3d 1373, 1377 (9th Cir. 1995) (quoting Strickland v. Washington, 466 U.S. 668, 690 (1984)). Even if Petitioner establishes that the legal assistance he received at trial was inadequate, Petitioner must go further and demonstrate prejudice as a result of the actions of counsel. In this context, prejudice means that Petitioner must demonstrate a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. Bearing in mind these principles. the Court will address each of Petitioner's grounds for claiming ineffective assistance of trial counsel.

(a) Playing of Tape of Interrogation

Because the playing of the tapes was not error for the reasons set forth above in part B.2.b, it cannot be shown that there was any prejudice resulting from counsel's failure to adequately object. Therefore, this is not a claim upon which

habeas relief should be granted.

(b) Final Argument by Prosecutor

Petitioner argues that several statements made by the prosecution in its final argument were unduly prejudicial, and should have been objected to by his trial counsel. During final argument, defense counsel stated that the defense was "... basically asking you to let him go based on the defendant's testimony. To let him walk out the door based on that testimony." The prosecutor also stated that Petitioner was the "biggest liar you will probably ever see" and then went out to say

> But to get up here and get on the stand and look at you people and tell you that story that he told you in front of the family, this piece of garbage, making up every little bit of it. He's the biggest liar you've ever encountered. He's a lot worse than that. I'm not going to tell you. You can imagine some of the things I would tell you what he really is. I'm not going to tell, because you know. You know in your hearts what else.

The prosecutor also told the jury in final argument "The reason he talked about involuntary manslaughter is because he knows that you know that the defendant is guilty."

Petitioner has failed to show that any of the prosecutor's comments were so egregious as to rise to the level of prosecutorial misconduct. The statements that Petitioner was a liar, and that he had made up a story, and that the story was garbage were all reasonable arguments based upon the evidence presented at trial. Therefore trial counsel's failure to object to the statements cannot be said to have been erroneous. The

implication by the prosecutor that he knew of other evidence of bad acts by Petitioner is slightly troublesome. However, it cannot be said that the statement was so egregious as to infect the trial with unfairness. Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974). Therefore, trial counsel was not ineffective.

(c) Guilt-Assuming Hypotheticals

Petitioner claims his counsel was ineffective for failing to object to several "guilt- assuming" hypotheticals asked by the prosecution. The prosecution asked several of the defense witnesses if their opinion of Petitioner's character would change if they reviewed all the evidence in the case, if the evidence showed beyond a reasonable doubt that Petitioner was guilty, or if they had an opportunity to investigate the truth of all the Petitioner's statements. Upon review of these statements, it is clear that these are not improper guilt-assuming hypotheticals such that they would have been inadmissible at trial. Therefore, trial counsel was not ineffective for falling to object to the questions.

(d) Officer's Testimony that Petitioner was Trying to Make Himself Cry

Petitioner claims his counsel was ineffective for failing to object to testimony by one police officer that on the morning of Jennifer's death Petitioner was acting like he was trying to cry. The California Court of Appeal found this was, in fact, improper lay opinion and should not have been permitted. However, the Court of Appeal found the admission of the evidence was harmless.

Upon review of the facts in this case, it cannot be said that the admission of this statement by the one police officer was

prejudicial. The evidence presented in this case was ample justify Petitioner's conviction. A statement by a police officer regarding his perception of Petitioner's state of mind would have had little if any effect upon the jury. Therefore, it cannot be said that trial counsel was ineffective.

(5) Constitutionality of California Felony Murder

Petitioner argues the California scheme allowing Petitioner to be found guilty of first degree murder based upon an unintentional homicide, and allowing a sentence in excess of what intentional murderers receive, is unconstitutional. Petitioner cites no authority for his contention, and does not even state what constitutional guarantee is violated by the California laws.

In Tison, 481 U.S. 137 (1987), the Court held that the Eighth Amendment does not prohibit the death penalty as being unconstitutionally disproportionate in the case of a defendant whose participate in a felony resulting in murder, even where the defendant's mental state is only one of reckless indifference. The Petitioner has cited no authority to the contrary. Therefore, Petitioner has not stated any basis for relief with regard to the constitutionality of his conviction or sentence for first degree murder.

Conclusion

For the foregoing reasons, it is the recommendation of Magistrate Judge Battaglia that the Petition for a Writ of Habeas Corpus be DENIED. This report and recommendation will be submitted to the United States District Judge assigned to this case, pursuant to the provisions of 28 U.S.C. §636(b)(l) (1988). Within thirty (30) days after this report and recommendation is mailed, any party may file written objections with the court and

serve a copy on all parties. The document should be captioned "Objections to Report and Recommendation," Any reply to the objections shall be served and filed within ten days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to raise those objections on appeal of the Court's order. Martinez v. Ylist, 951 F.2d 1153 (9th Cir. 1991).

Dated: 2/12/97

ANTHONY J. BATTAGLIA
United States Magistrate Judge

cc: Judge Moskowitz
All Counsel of Record

FEBRUARY 23, 1998

ORDER ADOPTING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION DENYING PETITIONER'S 28 U.S.C. §2254 PETITION FOR WRIT OF HABEAS CORPUS

FILED
FEB. 23, 1998
U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY // DEPUTY

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

SAMSON DUBRIA,	) Civil NO.96-CV-657K(AJB)
	)
Petitioner,	) ORDER ADOPTING
	) MAGISTRATE JUDGE'S
v.	) REPORT AND
	) RECOMMENDATION
D.A. SMITH, Warden, California	) DENYING PETITIONER'S
State Prison Corcoran, California,	) 28 U.S.C. §2254 PETITION
	) FOR WRIT OF HABEAS
Respondent.	) CORPUS
	)

On April 12, 1996, petitioner, a state prisoner proceeding by and through counsel, filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (`Petition'). United States Magistrate Judge Anthony J. Battaglia filed a Report & Recommendation (R&R) on February 13, 1997, which was submitted to United States District Court Judge Barry Ted Moskowitz for review pursuant 28 U.S.C. §636(b)(1) (1988). In the R&R, Magistrate Judge Battaglia receommends thaat the Petition be denied.

Petitioner filed Objections to the R&R on March 10, 1997.

Respondent did not reply to the Objections Judge Moskowitz recused himself from the case on February 6, 1998, and the case was reassigned to this court.

I. PROCEDURAL HISTORY

Petitioner was found guilty of murder together with a special circumstance of murder in the commission and attempted commission of rape following a jury trial in state court. The jury found the murder to be of the first degree. The jury also found petitioner guilty of rape by use of drugs and of administering a drug in order to enable and assist himself to commit a felony. On April 16. 1993, the state court sentenced petitioner to state prison for life without the possibility of parole for the special circumstance murder.

Petitioner filed an appeal with the California Court of Appeal, Fourth Appellate District, Division One,. as well as a Petition for a Writ of Habeas Corpus. Both the appeal and the petition were denied by the Court of Appeal on July 18, 1995. Petitioner's petition for review with the California Supreme Court was also denied on October 19, 1995. Petitioner filed a Petition for Writ of Certiorari with the United States Supreme Court which was denied on February 20, 1996. Respondent does not dispute that petitioner has exhausted his available state remedies.

The Petition raises six claims for relief: (1) insufficiency of the evidence, (2) violation of the Fifth Amendment; (3) violation of due process by instructional error; (4) violation of due process in evidentiary errors; (5) ineffective assistance of counsel; and (6) unconstitutionality of sentence.

II. BACKGROUND

The court takes the following facts from the R&R. The Magistrate Judge garnered the following information from the findings of fact in the July 18, 1995 unpublished opinion of the California Court of Appeal, Fourth Appellate District, Division One. These facts are entitled to a presumption of correctness under former 28 U.S.C. § 2254(d). See Paradis v. Arave, 130 F.3d 385, 390 (9th Cir. 1997); Poland v. Stewart, 117 F.3d 1094, 1103 (9th Cir. 1997)

A. Prosecution Case

1. Death of Jennifer Klapper

At approximately 3:09 a.m. on August 16, 1991, the Carlsbad Police Department was dispatched Room 224 at the All-star Inn in Carlsbad, California. The officer responding was admitted to the room by petitioner. Upon the officer's arrival, Jennifer Klapper was not breathing and had no pulse. Ms. Klapper was lying on the bed closest to the door, and the other bed had not been slept in. The officer and Petitioner began two person cardiopulmonary resuscitation (CPR). The Carlsbad police officer noticed no chemical odor in the room, and paid no attention to Ms. Klapper's face.

Firemen and paramedics arrived shortly thereafter. Ms. Klapper was moved from the bed to the floor. CPR was continued and other life-saving and monitoring procedures were undertaken, including the placing of an oxygen mask over Ms. Klapper's mouth and nose. None of these emergency personnel smelled a chemical odor in the room. Ms. Klapper was transported by ambulance to Tri-City Hospital, where further attempts were made to resuscitate her. All resuscitation attempts were to no avail. The emergency room doctor found no cause for Ms. Klapper's death.

2. Relationship Between Petitioner and Ms. Klapper

Jennifer Klapper, age 20, became friends with Petitioner, a 28 year old resident physician, at the medical library at Good Samaritan Hospital in Cincinnati, Ohio. The relationship between Ms. Klapper and the Petitioner was not a romantic one. Ms. Klapper had stated that she did not find Petitioner romantically desirable, and at the time of her death, was romantically involved in another relationship. Ms. Klapper and her boyfriend had talked of marriage. Several times after reaching California, Ms. Klapper called her boyfriend, including one call only hours before her death. During the phone conversations, Ms. Klapper told her boyfriend that she loved and missed him.

Petitioner had traveled to California to attend a class reunion, and asked Ms. Klapper if she wanted to along. Ms. Klapper discussed the trip with her boyfriend, explained her relationship with petitioner was merely a friendship, and expressed reluctance to go on the trip because, among other reasons, she would be away from her boyfriend. Ms. Klapper had expressed to another friend that she was uncomfortable about going to California with petitioner, since she did not know what he expected. Ms. Klapper stated to that friend that she did not find petitioner physically attractive and did not intend to have a physical relationship with him. Ms. Klapper's sister also overheard a telephone conversation in which Ms. Klapper told petitioner that they were just friends and if he expected to have a physical relationship while on the trip, she would have to cancel her plans to go.

3. Physical Findings and Cause of Death

The emergency room physician was unable to determine

why Ms. Klapper had suddenly died. Several hours after her death, Ms. Klapper's body was examined by a coroner's investigator. The investigator noticed the lycra pants Ms. Klapper was wearing were on inside out. Ms. Klapper was wearing jewelry, including an earring in her pierced right earlobe, but no earring in the pierced left earlobe. The investigator noticed scratches on Ms. Klapper's face including a half moon scratch on her left cheek.

4. Chloroform Poisoning

At petitioner's trial, Dr. Lucien Morris. an eminent anesthesiologist with extensive practical and experimental knowledge of chloroform, explained the history and nature of chloroform. Death can occur from the inhalation of chloroform in several ways. One is a "relative overdose". A lethal relative overdose occurs when a relatively small amount of chloroform is suddenly inhaled. The concentration of chloroform rises quickly, causing disruption of electrical activity in the heart. The amount of chloroform required to cause a relative overdose is very small.

Death may also result from a "frank overdose" of inhaled chloroform.. A frank overdose occurs when a large amount of chloroform is inhaled. Such inhalation causes a depression of several body systems, including the circulatory and respiratory systems to the extent that death can result.

Dr. Morris reviewed the medical, toxicological, and police reports in this case. He concluded that assuming chloroform was administered to Ms. Klapper in the motel room, it was possible its smell dissipated before the arrival of the police. Dr. Morris concluded Ms. Klapper's death resulted from a relative overdose of inhaled chloroform.

5. Petitioner's Statements.

Petitioner's statement to the paramedics at the All-star Inn, was that he had gone to the bathroom, and while in the bathroom he heard a cry or moan and then a 'thud" as if someone had fallen. Petitioner returned to the room and found Ms. Klapper on the floor. At that time, petitioner did not tell the paramedics or police that the two had sexual intercourse that night.

Later that morning at the hospital, petitioner talked with other officers, and repeated his rendition of the facts involving finding Ms. Klapper on the floor of the motel room. Petitioner told the officers that he had examined Ms. Klapper, found no pulse, and started CPR. He then left the room, went to the motel office, and asked the clerk to call 911. Petitioner told the officers he ran back to the room, discovered he had locked himself out, returned to the office to get another key, and return to the room. Petitioner stated he did not know why be did not use the telephone in the motel room to call 911. Petitioner did tell these officers that he and Ms. Klapper had sexual intercourse that evening, and that they were just friends. Later that morning, back at the All-star Inn, petitioner spoke with other officers. Petitioner told these officers that be and Ms. Klapper had been to a taping of the Johnny Carson Show, they had a pizza, bought some alcoholic beverages in Burbank, California and then drove to Carlsbad. Petitioner and Ms. Klapper were going to stay at a campsite at San Elijo State Beach, but arrived instead at the All-star Inn at about 11:30 p.m. There, they watched the show they had seen taped earlier in the day. Ms. Klapper complained of dizziness and headaches, and petitioner told the officers Ms. Klapper had a history of headaches. Petitioner then again restated his version of events regarding finding Ms. Klapper on the floor, administering CPR, leaving the room, and locking himself out.

Petitioner also told the officers that the paramedics arrived between five and fifteen minutes after he left the room. Petitioner stated he told paramedics he would follow them to the hospital, but stated he returned to the room to get information about reaching Ms. Klapper's family and about five minutes later departed. Petitioner stated this was only an estimate of time, that he was in a frenzy and stayed at the motel for a few minutes to catch his breath. Petitioner stated be told the paramedics he would follow them to the hospital, but meant he would follow later and not immediately. Petitioner told the officers that he and Ms. Klapper had intercourse that night, that he had a beer and mixed drink that night, and that Ms. Klapper had several sips of the drink. Petitioner told the officers that he did not know what had killed Ms. Klapper, and that they had been together all day and all evening except for short times when she used the telephone.

By October of 1991, coroner's investigators had determined Ms. Klapper's death was the result of chloroform intoxication. Petitioner was interviewed in New Jersey by Carlsbad police detectives on October 23, 1991. The officers sketched a theory for petitioner that petitioner had wanted to have sex with Ms. Klapper, used a little too much chloroform, resulting in her death. Petitioner denied having any knowledge of chloroform, having ever used chloroform, and killing Ms. Klapper. Petitioner stated that the act of intercourse that evening was consensual. Petitioner explained to the officers that he and Ms. Klapper had a reservation at a camp ground, but were scheduled to arrive at 7 or 8:00 p.m. Petitioner had told Ms. Klapper that they were not going to make it to the campsite in time, so petitioner found a motel with a low rate since the two were trying to save money, petitioner registered as a single and obtained a single room with two beds. Petitioner stated that Ms. Klapper agreed with this arrangement.

6. Check-In Procedures at San Elijo State Beach

Petitioner had a reservation for a camp site at the San Elijo State Beach for August 15-17, but records indicated he did not appear to claim the campsite. The entrance booth at the park closes between 10:30 and 11:00 p.m., but the park remains open. A note is placed in the window of the booth telling late comers which campsite has been assigned to them. Nothing on the park's recorded telephone message stated the reservations of late arriving campers would not be honored.

B. Defense Case

1. Rapist Profile and Character Evidence

Dr. Cynthia Stout, a marriage, family and child counselor, and Dr. Edward Conolley, a clinical psychologist, tested and took a history of petitioner. Both testified, as defense witnesses, that a profile existed for the majority of rapists and they found petitioner did not fit that profile. Petitioner also offered a series of witnesses who testified to his compassion. empathy, trustworthiness, and other traits of good character.

2. Medical Testimony

Dr. George Schwartz, a Board certified emergency room physician, reviewed the medical and police reports as well as the testimony in the case and researched the literature concerning chloroform. Dr. Schwartz agreed with most of the conclusions reached by the prosecution experts concerning chloroform, including that Mr. Klapper died from an adverse reaction to the presence of chloroform in her body. Dr. Schwartz, however, believed Mr. Klapper had ingested rather than inhaled the

chloroform as had been concluded by the prosecution's expert. Dr. Schwartz's calculations, based on the autopsy report, led him to believe that there was more than half a teaspoon of chloroform in Mr. Klapper's stomach contents at the time of her death. This amount was consistent with ingestion of the substance but not inhalation. Dr. Schwartz indicated that, while still unusual, chloroform's use to produce giddiness for recreational purposes was on the rise. Chloroform was both ingested and inhaled for such purpose.

Dr. Schwartz also believed that the injuries to Mr. Klapper's face were consistent with those which occurred during attempts at resuscitation. The doctor disagreed with the prosecution's expert testimony that since the injuries had bled they necessarily occurred before death. Dr. Schwartz believed CPR could have created enough circulation to cause blood seepage into post mortem facial injuries.

Dr. Schwartz concluded, given the electrical activity noted by the paramedics in Mr. Klapper's heart, death must have occurred from five to thirty minutes before the paramedics arrived. Dr. Schwartz believed the smell of chloroform would persist in a closed room for eight to twelve hours and would have been smelled by emergency personnel when they arrived. Oral ingestion would not have caused a great deal of vaporization, and the doctor believed that attempts at getting rid of the smell could be successful in a relatively short period of time.

4. Petitioner's Testimony

Petitioner testified in his own defense, stating he met Mr. Klapper at the library at Good Samaritan Hospital in Cincinnati, Ohio. Eventually Mr. Klapper was laid off from the library. However the two maintained a relationship. Petitioner and Mr.

Klapper went out on seven "formal dates," including going out for dinner, playing tennis, and simply going for walks. Petitioner had kissed her for the first time in April of 1991, and in May of 1991, after bowling the two kissed and "cuddled" in the back seat of petitioner's car.

In March of 1991, the two began discussing a trip to California. Petitioner told Mr. Klapper he was able to purchase a round trip ticket to Los Angeles that would allow two persons to fly for $189. In June, 1991, petitioner left Ohio and moved to New Jersey. The two communicated by telephone and continued discussing the California trip. Eventually, the two agreed to come to California and petitioner arrived before Mr. Klapper and picked her up on August 11, 1991 at the airport.

Petitioner and Mr. Klapper went to petitioner's parents' house, where petitioner slept on the living room couch and Mr. Klapper slept in one of the bedrooms. The two spent several days seeing the sites. On August 15 at 4:00 p.m.. petitioner and Mr. Klapper watched the taping of the Johnny Carson show. The taping lasted about 2½ hours. When it was over, the two departed with camping gear for the San Elijo State Beach campground. On the way, they stopped for dinner and picked up a beer and a fuzzy navel mixed drink. It was 9:30 p.m. before the two left for the campground.

Petitioner and Mr. Klapper stopped for gas, and petitioner called the campground. He was told visitors were not accepted after 10:30 p.m.. Since it was already after 10:30 p.m. and they did not know how to get to the campsite, they decided to seek other accommodations for the night. Petitioner registered at the All-star Inn. The pair settled into the room at about 11:30 p.m., and Mr. Klapper turned on the television to watch the Johnny Carson Show they had seen taped earlier in the day. Mr. Klapper

lay on one of the two beds, and Petitioner walked between the beds, handed her the fuzzy navel drink and turned off the light on the nightstand. Mr. Klapper moved over on the bed, indicating petitioner should lie down next to her. Petitioner put his arm around Mr. Klapper and the two began to "cuddle". The two talked, kissed, and eventually had intercourse. Before having sexual relations petitioner asked Mr. Klapper if she was using any type of birth control method. Mr. Klapper stated she was on the pill.

Petitioner again testified regarding the sequence of events leading up to Mr. Klapper's death, consistent with his earlier statements to police. Thereafter, petitioner stated that he was told by the fire captain they would be taking Mr. Klapper to Scripps Hospital in Encinitas and that he drove there. Upon arriving, petitioner was told that Mr. Klapper had not been brought there, he was told she might have been taken to Tri-City Hospital and was given directions to that location. Petitioner went to Tri-City Hospital and found Mr. Klapper had been pronounced dead.

C. Prosecution Rebuttal

1. Character Evidence

The prosecution offered the testimony of three doctors who had worked with petitioner. The doctors did not believe petitioner was trustworthy and did not believe petitioner had a good reputation for trustworthiness.

2. Evidence Concerning Birth Control Pills

Ms. Klapper's gynecologist testified that in August of 1991, Ms. Klapper complained of menstrual spotting between

her periods. On August 2, 1991, the doctor, without Ms. Klapper's request that he do so, prescribed a cycle of birth control pills to treat the problem. The doctor had never before prescribed birth control pills for Ms. Klapper. Ms. Klapper was given two packages of pills, and she was to begin taking the pills on August 18, 1991, two days after her death. In Ms. Klapper's belongings turned over to her father after her death was a single packet of birth control pills with none of the pills missing.

3. Rapist Profile

Forensic psychiatrist Dr. Melvin Goldzband testified there was no such thing as a rapist profile which can predict whether a person will commit rape.

4. Recreational Use of Chloroform

Dr. Bushong, the emergency room doctor who treated Ms. Klapper, stated that he had never heard of the use of chloroform for recreational purposes, and had never heard of any patient at his hospital, other than Ms. Klapper, who had died from an overdose of chloroform.

5. Chloroform Intoxication

Dr. Graham Jones, a pharmacologist and toxicologist familiar with chloroform, concluded Dr. Schwartz was mistaken when he concluded Ms. Klapper had ingested rather than inhaled the chloroform found in her system. Dr. Jones demonstrated mathematically that Dr. Schwartz was mistaken when he concluded there was from a half to one teaspoon of chloroform in Ms. Klapper's gastric contents at the time of her death, noting the actual amount of chloroform present was about one thousand part of one teaspoon. Dr. Jones concluded that Ms. Klapper did

not ingest chloroform, and that the amount of chloroform found in Ms. Klapper's body fluids was consistent with those of a person who died from a fairly quick inhalation of a fairly high concentration of chloroform. Dr. Jones testified it was certainty possible for the odor of chloroform to dissipate in half hour to an hour.

D. Defense Surrebuttal

Dr. Schwartz agreed he had made an error concerning the amount of chloroform in Ms. Klapper's gastric contents. Dr. Schwartz still believed it was possible Ms. Klapper had ingested rather than inhaled chloroform. Dr. Schwartz believed other causes of death were possible, including aspiration, noting aspirated material was found in Ms. Klapper's lungs.

The defense also recalled one of its psychological experts who stated the individual who would commit the crimes in this case would have signs of mental disturbance that would have been detected in testing, and that petitioner did not fit the psychological profile of a rapist.

E. Prosecution Surrebuttal

Dr. Jariwala testified that Ms. Klapper did not die from aspiration, and again discounted all possible causes of death except chloroform intoxication.

The second packet of birth control pills given to Ms. Klapper by her gynecologist was found in a cabinet in the bathroom used by Ms. Klapper at her home.

III. STANDARD OF REVIEW

The district court reviews de novo those portions of the R&R which are challenged by the petitioner's Objections and may accept, modify, or reject the findings contained therein. See 28 U.S.C. § 636(b)(1). Petitioner filed this Petition on April 12. 1996, prior April 24, 1996, the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Pub. L. No . 104-32. 110 Stat. 1214. As held in the R&R, the amendments made by thc AEDPA thus, do not affect this appeal. See Paradis, 130 F.3d at 390 (citing Lindh v Murphy, __ U.S. __, 117 S. Ct. 2059, 138 L.Ed.2d 481 (1997); Jeffries v. Wood, 114 F.3d 1484 (9th Cir. 1997) (en banc)). Hence, statutory references the provisions governing federal habeas corpus as they existed existed before April 24, 1996.

Title 28, United States Code, section 2254(a), sets forth the following scope of review for federal habeas corpus claims

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgement of a State court only on the ground that he is in custody in violation of the Constitution or law or treaties of the United States.

28 U.S.C. § 2254(a) (1994) (emphasis added). See Hernandez v. Ylst, 930 F.2d 714, 719 (9th Cir. 1991), 28 U.S.C. §§ 2241(e)(3); Rule 1(a)(1), 28 U.S.C. foll. § 2254.

Thus, each claim in a federal habeas corpus petition must allege a deprivation of one or more federal rights to present a cognizable claim pursuant to § 2254. A state's interpretation of its own laws affords no basis for federal habeas corpus relief because no federal constitutional question arises. Estelle v McGuire, 502 U.S. 62, 67-68 (1991) (holding that federal habeas

corpus relief does not lie for errors of state law, and federal court may not reexamine state court determinations on state law issues). The purpose of habeas corpus proceedings under § 2254 is to require state convictions meet federal constitutional requirements applicable to the states. A federal district court does "not sit as a 'supper' state supreme court" with general supervisory authority over the proper application of state law. Smith v. McCotter, 780 F.2d 697, 700 (5th Cit. 1986); see Lewis v. Jeffers, 497 U.S. 764, 781) (1990) (federal habeas court must respect state court's application of its own law); Jackson v. Ylst, 921 F.2d 582 (9th Cir. 1990) (federal court has no authority to review state's application of state law). Instead, federal courts may only intervene in state judicial proceedings to correct errors of federal constitutional magnitude. Oxborrow v. Eikenberry, 877 F.2d 1395, 1400 (9th Cir. 1989) (stating that federal courts are not concerned with errors of state law unless they rise to level of constitutional violation).

With respect to evidentiary hearings, the Ninth Circuit Court of Appeal has repeatedly stated the standard for determining whether to grant an evidentiary hearing is as follows:

> A habeas petitioner is entitled to an evidentiary hearing on a claim if (1) the petitioner's allegations, if proved, would entitle him to relief, and (2) the state court trier of fact has not, after a full and fair hearing, reliably found the relevant facts. No hearing is required if there no disputed facts and the claim presents a purely legal question.

Williams v. Calderon, 52 F.3d 1465, 1484 (9th Cir.) (citations and internal quotation marks omitted), cert. denied, 116 S. Ct. 937 (1996), Bonin v. Calderon, 59 F.3d 815, 838 (9th Cir. 1995)(upholding district court's denial of evidentiary hearing

request because petitioner had failed to state facts which, if proved, would have entitled him to relief), cert. denied, 116 S. Ct. 718 (1996).

IV. DISCUSSION

As noted previously, the Petition raises six claims for relief: (1) insufficiency of the evidence; (2) violation of the Fifth Amendment; (3) violation of due process by instructional error, (4) violation of due process in evidentiary errors; (5) ineffective assistance of counsel, and (6) unconstitutionality of sentence. The Magistrate Judge denied petitioner's claim for relief, and petitioner filed Objections which challenge the R&R.

Along with specific objections, petitioner reiterates those arguments submitted in his Petition and states that he objects generally to the entirety of the Magistrate Judge's recommendation that the Petition be denied. According to 28 U.S.C. § 636(b)(1), "a judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject or modify, in whole or in part, the findings or recommendations made by the magistrate." After a de novo review of the R&R and petitioner's arguments, this court rejects petitioner's general objection to the R&R and accepts the findings contained therein to the extent petitioner does not object to them specifically. Accordingly, the court shall address Petitioner's specific objections to the R&R in the order presented in his Objection.

A. Insufficiency of Evidence

Petitioner claims that there was insufficient evidence to convict him. His argument consists of two points which the

Magistrate Judge rejected. First, petitioner claims that there was no factual basis upon which a reasonable jury could have found him guilty beyond a reasonable doubt of the murder, rape, and rape special circumstance. Second, petitioner claims that his rights to due process were violated by the presentation by the prosecution of false, contaminated toxicological evidence.

1. Insufficiency of Evidence

As held in the R&R, where a state prisoner claims, under 28 U.S.C. Section 2254, that he is entitled to relief due to the insufficiency of the evidence, the relevant inquiry is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." United States v. Riggins, 40 F.3d 1055, 1057 (9th Cir. 1994)(quoting Jackson v. Virginia, 443 U.S. 307, 319). The Magistrate Judge held that the evidence in the case was sufficient to support the finding that petitioner was guilty of the crimes charged.

Petition claims that the R&R incorrectly stated that the petitioner "accept[ed] that Jennifer died from chloroform intoxication." R&R at 13. Instead petitioner contends that he merely assumed arguendo that the evidence of the chloroform was accurate and that the small amounts testified to in the trial were actually found in Jennifer's body fluids." Traverse at 14. This alleged inadvertence in the R&R does not affect the overall evaluation of the evidence presented in this case. The Magistrate Judge evaluated all of the evidence presented against defendant at trial. The R&R concluded that there was sufficient evidence to convict petitioner under the Jackson rule. After reviewing the record de novo this court agrees with the Magistrate Judge's findings. The apparent misstatement in the R&R pointed out by

petitioner, does not affect the conclusion that "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Riggins, 40 F.3d at 1057 (quoting Jackson, 443 U.S. AT 319).

In addition, petitioner argues that the evidence and theory of guilt presented by the prosecution against him constituted "sheer speculation" and "speculative inferences." The State compiled and presented a circumstantial case to the jury. However, the fact that the prosecution's case consisted of circumstantial evidence does not mean that there was insufficient evidence to support the verdict. The summary of evidence presented earlier in this ruling is illustrative of the fact that "after viewing the evidence in the light most favorable to the prosecution, "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Id.

2. Claim of False, Contaminated Toxicological Evidence

Petitioner argues that he was denied due process of law by the presentation of false, contaminated toxicological evidence by the prosecution at trial. In support of his proposition that such claim supports habeas relief, petitioner cites to United States v. Young, 17 F.3d 1201, 1203-04 (9th Cir. 1994). The Young court held the following: "A conviction based in part on false evidence, even false evidence presented in good faith, hardly comports with fundamental fairness. Thus, even if the government unwittingly presents false evidence, a defendant is entitled to a new trial 'if there is a reasonable probability that [without the evidence] the result of the proceeding would have been different.'" Young, 17 F.3d at 1203-04 (quoting United States v. Endicott, 869 F.2d 452, 455 (9th Cir. 1989)). This court agrees with the Magistrate Judge's analysis of this case, the R&R concluded that this case is inapposite in this instance. Most important to this analysis, the

Magistrate Judge found that petitioner makes no showing that the toxicological evidence was "false." As a result, Young does not apply. Instead, petitioner merely challenges the prosecution's theory of the case.

In his objection to this finding, petitioner reiterates the same arguments. He states that he "did produce evidence sufficient to show through both mishandling of the body fluids and tissue samples and an incomplete autopsy . . . leading to a speculative diagnosis, the picture painted for petitioner's jury was false and led to the false diagnosis that the cause of death was chloroform poisoning." Objections at 2-3. In essence, these contentions are merely challenges to the prosecution's case; petitioner presents a battle of the experts and requests that the court resolve the matter in his favor. Though petitioner disputes the validity of the evidence and the conclusion drawn therefrom, petitioner has not demonstrated that the evidence was "false." Consequently, the court agrees with the conclusions contained in the R&R with respect to this issue.

B. Miranda Claims

Petitioner raises two claims with regard to alleged violations of his rights under Miranda v. Arizona, 384 U.S. 436 (1966). First, petitioner claims that when he was questioned by officers in New Jersey on October 23, 1991, he was "in custody" for purposes of Miranda and should have been advised of his rights. He claims, therefore, that any statements taken from him should have been excluded at trial. Second, petitioner claims that his due process rights were violated when a tape recording of the interview was played for the jury, a transcript of the interview was given to the jury, and the prosecution exploited inconsistencies in statements made during the interview.

The following facts are relevant to the "in custody" inquiry regarding the alleged Miranda violation and are taken from the July 18., 1995 unpublished decision of the California Court of Appeal. These facts are entitled to a presumption of correctness under former 28 U.S.C. § 2254(d).

After his initial interview with the Carlsbad Police Department on August 16, 1991, petitioner returned to his home in New Jersey. On the morning of October 23, 1991, two officers from the Carlsbad Police Department arrived at the New Jersey complex where petitioner lived, along with Sergeant Gannon of the Morris County New Jersey prosecutors's office. All of the officers were in plain clothes and their car was unmarked. The officers believed petitioner was a prime suspect in Ms. Klapper's murder.

As the officers drove up to the complex, they saw petitioner walking toward a parking lot. One of the Carlsbad officers got out of the car and asked petitioner if he would go with the officers to an office in town to talk. Petitioner agreed to go but wanted to call the hospital whereupon the officer suggested petitioner call from the office. Petitioner was told he would be brought back after the interview. On the ride to the office, petitioner and the officers discussed the weather, the area in which petitioner lived, the officer's flight from California., and other topics not related to the homicide. Petitioner asked how long the interview would take and was told it would take between one and two hours. No force or suggestion of force was used in contacting petitioner, and no restraints were employed by the officers in transporting petitioner.

Petitioner was taken to the prosecutor's office located in an office building. He was not taken to a police station. Petitioner asked and was allowed to make several telephone calls privately

from a lieutenant's office. Petitioner was offered food and use of the facilities, and then was questioned by the Carlsbad Police officers in an interview room. The officers told petitioner the door to the room was unlocked and that he could leave at any time. Petitioner was also told he would be given a ride home. Petitioner told the officers they could ask him anything they liked.

The officers obtained some background information from petitioner and then told him if he had anything to do with Ms. Klapper's death he should tell them about it. The trial court found that the tone of the officers' questions and comments was that the officers believed petitioner was involved in causing Ms. Klapper's death. Petitioner told the officers he had nothing to do with Ms. Klapper's death. The investigators asked if petitioner would be willing to submit to a polygraph test; petitioner stated that he would and that the test would show that he had nothing to do with Ms. Klapper's death.

The officers went on to tell petitioner they believed he was responsible for Ms. Klapper's death but that her death was probably an accident. Petitioner asked the officers what evidence they had whereupon the officers said they knew what happened and it was time petitioner told the truth. The officers told petitioner that Ms. Klapper died of chloroform intoxication.

The interview became a sparring session, with the officers explaining how they believed petitioner caused Ms. Klapper's death and with petitioner denying he caused Ms. Klapper's death. Petitioner recounted for the officers his version of what happened on the trip and the night Ms. Klapper died.

At one point, petitioner requested that the interview stop so he could call his family. Petitioner was allowed to make this telephone call, and thereafter, petitioner stated that he wished to

make no further statements. After the officers asked petitioner questions not directly related to Ms. Klapper's death, petitioner asked what would happen next. The officers told petitioner they would take him home and would continue working on the case. The officers then proceeded to ask additional questions and make additional comments regarding the case.[1] Thereafter the interview ended, and one of the Carlsbad officers drove petitioner home.

At no time was petitioner told he was under arrest. In fact, petitioner was told on several occasions he was not under arrest, that he was free to go at any time and that he would be given a ride either home or to work.

1. Claim of Miranda Violation

Warnings under Miranda v. Arizona are required to be given prior to "custodial interrogation." Custodial interrogation is defined as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Miranda, 384 U.S. at 444. In a noncustodial setting, where the person being questioned has not been formally arrested or otherwise formally detained, "Miranda warnings are required only where there has been such a restriction on a person's freedom as to render him 'in custody.'" Oregon v. Mathiason, 429 U.S. 492, 495 (1977). The Court "must examine all of the circumstances surrounding the interrogation but the ultimate inquiry is simply whether there [was] a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.'" Stansbury v. California, 114 S. Ct. 1526, 1529 (1994)(quoting California v. Beheler, 463

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[1] The trial court excluded evidence of the interrogation after petitioner stated the he no longer wanted to speak, holding that the officers at that point should have ceased their interview with the petitioner.

U.S. 1121, 1125 (1983)). An officer's knowledge or belief regarding the guilt of the person being interviewed are relevant only insofar as they are conveyed by word or deed to the person being interviewed, and to the extent those beliefs "would affect how a person in the position of the individual being questioned would gauge the breadth of his or her 'freedom of action.'" Stansbury, 114 S. Ct. at 1530.

The factual determination of the state court regarding the circumstances surrounding the interrogation are entitled to a presumption of correctness under the former Section 2254(d). However, the ultimate determination of whether a person is "in custody" for purposes of requiring Miranda warnings is a mixed question of fact and law which must be reviewed by the federal court independently based upon the facts. Thompson v. Keohane, 116 S. Ct. 457, 465 (1995).

Though the interview between the officers and petitioner contained some element of coercion, it cannot be said that petitioner's interview in this case took place under circumstances as to lead a reasonable person to believe that he was no longer free to leave. See U.S. v. Hudgens, 798 F.2d 1234, 1236 (9th Cir. 1986)("Every police interview has coercive aspects; instead the 'ultimate question is simply whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest.'")(citations omitted). This court agrees that the analysis contained in the R&R which concluded that petitioner was not in "custody" for the purposes of Miranda.

The courts have used several factors to determine if a particular scenario constitutes a state of custody for the reasonable person. See U.S. v. Beraun-Panez, 812 F.2d 578, 580 (9th Cir.) modified, 830 F.2d 127 (9th Cir. 1987)(pointing to the language used to summon an individual, the confrontation, the

physical setting, the duration, and the degree of pressure of an interrogation as factors in determining whether an accused is in custody). In this case, petitioner voluntarily accompanied the officers who approached him at his apartment complex in plain clothes and in an unmarked car. The officers allowed petitioner to make a number of private phone calls at the prosecutor's office before the interrogation began. A reasonable person would less likely feel isolated given this freedom to communicate with others. See Beraun-Panez, 812 F.2d at 582 ("The Supreme Court in Miranda noted that isolating a subject from others, who might lend moral support to the person questioned and thereby prevent inculpatory statements was a technique of psychological coercion.") He offered to cooperate with the investigators once he was confronted and asked questions of the investigations regarding the evidence in the case.

Petitioner stresses that although he was told that he was free to go prior to the point of time the accusatory interrogation began, once the pointed interrogation began, a reasonable person would not have believed he was still free to go. However, the officers repeatedly told petitioner that he was free to leave and that the door to the room was unlocked. When petitioner expressed a desire to take a break from the questioning to call his family, he was permitted to make the telephone call in private. After further questioning, he was given a ride back home. As noted in footnote one, the trial court excluded evidence of the interrogation after petitioner stated he no longer wanted to speak. Under all of the circumstances, it cannot be said that the circumstances surrounding the interview were so coercive as to render the petitioner "in custody" and require the giving of Miranda warnings. Therefore, petitioner's argument that his Miranda rights were violated by the October 23, 1991 interview does not justify relief.

2. Introduction of Taped Statements

Petitioner argues that his right to due process was violated by the introduction in evidence of his statements taken during the interview on October 23, 1991. During the testimony of the interrogating officers, the unedited tape of the October 23, 1991 interview was played and the jurors were provided transcripts of the recording. As the R&R states, the interview on October 23, 1991, was essentially a sparring session, with the officers expressing their belief in petitioner's guilt, and his involvement in Ms. Klapper's death. In his Petition and Objections, petitioner argues that the playing of the tape recording and the provision of the transcript of the interview to the jury was a highly prejudicial and inflammatory means of putting before the jury otherwise inadmissible opinions and statements of the chief investigating officer regarding petitioner's guilt. Petitioner argues that the introduction of the tape recorded interview, both individually and when combined with the alleged Miranda violation, violated his right to due process.

This court agrees with the findings of the R&R that the introduction of the tapes was clearly not an erroneous mistake on the part of the trial court nor did the introduction of the tapes rise to the level of violating fundamental fairness. The R&R held that errors regarding state court evidentiary rulings ordinarily do not rise to the level of constitutional violations. Estelle v. McGuire, 502 U.S. 62 (1991). The category of errors which violate "fundamental fairness" so as to amount to a violation of due process is narrow. Id. at 72. The inquiry is whether the alleged error "so infused the trial with unfairness as to deny due process of law." Id. at 75 (quoting Lisenba v. California, 314 U.S. 219, 228 (1941)). In this case, the jury was instructed and admonished that the officer's statements were not admitted for their truth but only to be considered as giving meaning and context to the

petitioner's statements. Therefore, it is not at all clear that the introduction of the statements was erroneous. Even if the introduction of the statement was erroneous, it cannot be said that the introduction of the tape recorded interview or the transcript rises to the level of violating fundamental fairness. Therefore, petitioner's argument that he was denied due process is not a sufficient basis for the granting of habeas relief on his Petition.

C. Violation of Due Process by Instructional Error

Petitioner argues that his rights to due process were violated by the trial court's failure both to give lesser included offense instructions regarding rape and to give a proper reasonable doubt instruction. The Magistrate Judge concluded that petitioner's right to due process was not violated by either the state court's failure to give a lesser included offense instructions regarding rape and the contents of the court's reasonable doubt instruction. In the Objections, petitioner simply reiterates those arguments presented in his Petition regarding these issues. After reviewing the issues de novo this court agrees with the ruling in the R&R with respect to these arguments and incorporates it herein by reference.

D. Due Process Violation As a Result of Evidentiary Errors

Petitioner claims his right to due process was violated as a result of evidentiary errors by the trial court. First, petitioner argues the trial court erred in admitting rebuttal evidence by the prosecution relating to his alleged lack of trustworthiness. Petitioner asserts this error was exacerbated by limitations placed upon defense counsel in cross-examination of the rebuttal

witnesses. Second, petitioner argues the trial court erred in excluding inquiry regarding Ms. Klapper's previous use of birth control methods.

1. Lack of Trustworthiness

The R&R extensively details the testimony presented regarding petitioner's character and reputation. This court shall not reiterate the facts of the testimony presented and, hereby, incorporates the facts in this section of the R&R. The Magistrate Judge concluded that it cannot be said that the trial court's decision to allow rebuttal evidence regarding petitioner's trustworthiness is an error rising to the level of violation of due process. Petitioner presented extensive character evidence on his traits of compassion, empathy, and other traits of good character and opened the door to the testimony of the doctors regarding lack of trustworthiness. Petitioner was also permitted ample opportunity to provide evidence in rebuttal to the prosecution's testimony regarding his lack of trustworthiness. There was likely no error at all, and there certainly was no error in this regard rising to the level of a violation of due process.

With regard to the exclusion of defense inquiry on cross-examination regarding the particulars of the petitioner's professional evaluations, a trial court may impose reasonable limits upon cross-examination, including inquiry regarding possible bias. Olden v. Kentucky, 488 U.S. 227, 232 (1988). Where the limitation is unreasonable, however, there may be a violation of the Confrontation Clause resulting from the limitation. Id. In this case the trial court found that allowing specific inquiry regarding the content of the evaluation of Dr. Pilger was barred as a specific instance of conduct or misconduct. The trial court did permit defense counsel to make general inquiry regarding the evaluation. Also during cross-examination, defense

counsel impeached Dr. Dumbauld by showing he gave petitioner a recommendation without mentioning any lack of trustworthiness. Petitioner was also given the opportunity and did present further character witnesses to rebut the prosecution's claim that he lacked trustworthiness. Upon a review of the record, the Magistrate Judge concluded that it cannot be said that the limitation on cross-examination imposed by the trial court was in any way unreasonable so as to violate petitioner's right to due process, and this court concurs.

In the Objections, petitioner argues that it was unfair of the court to allow the prosecution to present three character witnesses to rebut the "single word" testimony regarding trustworthiness offered by one of petitioner's witnesses. However, this assertion alone neither constitutes an error on the part of the trial court nor establishes a violation of petitioner's due process rights. This court, therefore,. agrees with the conclusions and reasoning in the R&R; petitioner's claim that he was denied due process as a result of the admission of evidence by the prosecution of petitioner's lack of trustworthiness, and also as a result of the limitation of cross-examination of Dr. Dumbauld, are not bases for habeas relief.

2. Evidence of Birth Control

Petitioner sought to elicit testimony from Ms. Klapper's gynecologist that in December of 1989, she told him she was sexually active and using "rubber and rhythm methods" of birth control. Defense counsel argued that Ms. Klapper's knowledge about birth control methods was relevant to her willingness to consent to sexual intercourse with petitioner. The trial court found the testimony inadmissible pursuant to Section 1103 of the California Evidence Code as evidence of prior sexual conduct. The state court noted it was petitioner's testimony that raised the

issue of Ms. Klapper's use of birth control pills that the prosecution had narrowly responded to the petitioner's testimony in this regard by introducing evidence by Ms. Klapper's gynecologist that he had prescribed the pills for a medical problem and that she had not started taking the pills. The Court also found the inquiry inappropriate under Section 352 of the Evidence Code since it would be time consuming and there would be a danger of confusion and potential prejudice.[2]

The right to confront witnesses under the Sixth Amendment includes the right to cross-examination. Davis v. Alaska, 415 U.S. 308, 315-16 (1974). It also includes the right to present relevant evidence. Michigan v. Lucas, 111 S. Ct. 1743, 1746-47 (1991). It is within the discretion of the trial court, however, to exclude irrelevant evidence, and to determine which are relevant. United States v. Torres, 937 F.2d 1469, 1473 (9th Cir. 1991).

"Even relevant evidence may be excluded in certain circumstances. The right to present relevant testimony 'may in appropriate cases bow to accommodate other legitimate interests in the criminal trial process.'" Wood v. Alaska, 957 F.2d 1544, 1549 (9th Cir. 1992)(quoting Chambers v. Mississippi, 410 U.S. 284, 295 (1973). For example, the Supreme Court has recognized that a state has a legitimate interest in protecting rape victims against unwarranted invasions of privacy and harassment regarding their sexual conduct. Wood, 957 F.2d at 1549.

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[2] The trial court noted, from prior discussion between the parties and the court, that it was aware the prosecution had evidence that Ms. Klapper had engaged in sexual intercourse with aprevious boyfriend, had been traumatized by the experience, and had indicated she would have no further encounters. The court decided it was best to confine the evidence regarding Ms. Klapper's sexual history to that already presented.

In the R&R, the Magistrate Judge ruled that even if the evidence were of some marginal relevance, it cannot be said the trial court abused its discretion in excluding the evidence given the potential for confusion of the issues and prejudice. The magistrate court held that the exclusion of evidence regarding Ms. Klapper's prior sexual history or knowledge and use of birth control did not violate petitioner's rights under the Sixth Amendment.

In his Objections, petitioner argues that he should have been allowed to introduce the testimony regarding Ms. Klapper's knowledge about birth control contained in the physician's notes. He claims the testimony was relevant to rebut the physician's direct testimony about the purposes of the birth control prescription. According to petitioner, the notes contradict the physician's assertion that he prescribed the birth control pills for Ms. Klapper's menstrual spotting and demonstrate that he and Ms. Klapper discussed her sexual activity. Though there is evidence that Ms. Klapper and her physician discussed her sexual activity, the notes do not contradict the physician's testimony as to why he prescribed the pills. More importantly, petitioner provides no basis for this court to conclude that the state court abused its discretion when it excluded evidence of the victim's prior sexual history. Moreover. to admit the discussion about birth control would necessitate evidence of the trauma she experienced by her prior sexual encounter and her resulting desire to abstain. There was a danger of an undo consumption of time when the only relevance of the birth control issue was to reiterate petitioner's statement that petitioner said she was on the pills. The court, therefore, agrees with the R&R which ruled that petitioner's claim in this regard is not a basis for habeas relief.

E. <u>Ineffective Assistance of Counsel</u>

Petitioner claims he was denied effective assistance of trial counsel in four instances (1) counsel failed to appropriately object to the playing of the tape of the October 23, 1991 interrogation; (2) counsel. failed to object to certain statements made by the prosecution in closing argument; (3) counsel failed to object to the asking of guilt-assuming hypotheticals by the prosecution; and (4) counsel failed to object to the officer's testimony that on hearing of Ms. Klapper's death, petitioner appeared to be trying to make himself cry.

As stated in the R&R, in order to prevail on his claim of ineffective assistance of trial counsel, petitioner must "overcome a strong presumption that counsel 'rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment' and established that [counsel's] performance was 'outside the wide range of professionally competent assistance.'" Clabourne v. Lewis, 64 F.3d 1373, 1377 (9th Cir. 1995)(quoting Strickland v. Washington, 466 U.S. 668, 690 (1984). Even if petitioner establishes that the legal assistance he received at trial was inadequate, petitioner must go further and demonstrate prejudice as a result of the actions of counsel. In this context, prejudice means that petitioner must demonstrate a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland v. Washington, 466 U.S. at 694.

The R&R addressed each of petitioner's grounds for claiming ineffective assistance of trial counsel. The Magistrate Judge found that petitioner could not meet the two-prong Strickland test and that he could not establish that his counsel was ineffective in any respect.

1. Playing of the Interrogation Tape

Petitioner objects generally to the R&R's conclusion that there could be no ineffective assistance claim on this issue given the determination that there was no error in playing the tape. In this instance, the court concurs with the R&R and also concludes that the playing of the interrogation tape was not in error; therefore, it cannot be shown that there was any prejudice resulting from counsel's failure to object adequately. Thus, the court may not grant habeas relief on this issue.

2. Final Argument by Prosecutor

Petitioner argues that several statements made by the prosecution in its final argument were unduly prejudicial and should have been objected to by his trial counsel. However, the R&R states that petitioner has failed to show that any of the prosecutor's comments were so egregious as to rise to the level of prosecutorial misconduct. In his Objections, petitioner claims that the prosecutor's inflammatory comments referring to personal knowledge of worse "things" about the petitioner constitute highly prejudicial and egregious behavior. Petitioner argues that his counsel's failure to object to this comment represent ineffective assistance of counsel since the comment itself was grossly prejudicial.

This court agrees with the R&R's conclusion that the statements that petitioner was a liar, that he had made up a story, and that the story was "garbage" were all reasonable arguments based upon the evidence presented at trial. Therefore, trial counsel's failure to object to these statements cannot be said to have been erroneous.

The implication by the prosecutor that he knew of other

evidence of bad acts by petitioner is a more troublesome statement. The prosecutor stated the following: "[petitioner is] the biggest liar you've encountered. He is a lot worse than that. I'm not going to tell you.. You can imagine some of the things I would tell you what he really is. I'm not going to tell, because you know. You know in your hearts what else." In addition, the prosecutor argued that "the reason [defense counsel] talked about involuntary manslaughter is because he knows that you know that the defendant is guilty." However, as the R&R stated, it cannot be said that these statements were so egregious as to infect the trial with unfairness. Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974). Therefore, trial counsel's representation on this issue cannot be considered ineffective.

3. Guilt-Assuming Hypotheticals

Petitioner claims his counsel was ineffective for failing to object to several "guilt-assuming" hypotheticals asked by the prosecution. The prosecution asked several of the defense witnesses if their opinion of petitioner's character would change if they reviewed all the evidence in the case, if the evidence showed beyond a reasonable doubt that petitioner was guilty, or if they had an opportunity to investigate the truth of all the petitioner's statements. The R&R stated that upon review of these statements, "it is clear that these are not improper guilt-assuming hypotheticals such that they would have been inadmissible at trial. Therefore, trial counsel was not ineffective for failing to object to the questions." R&R at 26.

Relying on U.S. v. Siers, 873 F.2d 747 (4th Cir. 1989), petitioner claims that these types of hypotheticals are improper in a criminal trial. 873 F.2d at 749 (condemning the use of hypothetical questions in the cross-examination of character witnesses). In that case, however, the court upheld the

conviction by concluding that the hypotheticals put to the defendant's witnesses constituted harmless error. Id. at 750. In the case at bar, based on the law cited, it is unclear whether the hypotheticals actually put to the defendant's character witnesses may be considered improper under California law. Even if they were improper, their presentation did not constitute reversible error; instead, in light of the prosecution's case against defendant the introduction of these hypotheticals was harmless error. Since the hypotheticals do not jeopardize the validity of the jury's verdict, petitioner cannot claim that his counsel provided ineffective assistance by not objecting to their presentation.

4. Officer's Testimony that Petitioner Was Trying to Make Himself Cry

Petitioner claims his counsel was ineffective for failing to object to testimony by one police officer that on the morning of Ms. Klapper's death, petitioner was acting like he was trying to cry. The California Court of Appeal found this was, in fact, improper lay opinion and should not have been permitted. However, The Court of Appeal found the admission of the evidence was harmless.

This court agrees with the R&R and the California Court of Appeals. Though the lay opinion was improper, it cannot be said that the admission of this by the one police officer was prejudicial. The evidence presented in this case was ample to justify petitioner's conviction. It appear that a statement by a police officer regarding his perception of petitioner's state of mind would have had little if any effect upon the jury. Therefore, it cannot be said that trial counsel was ineffective.

F. Constitutionality of California Felony Murder

In his Petition, petitioner argues the California scheme allowing petitioner to be found guilty of first degree murder based upon an unintentional homicide and allowing a sentence in excess of what intentional murderers receive is unconstitutional. In his Objections, petitioner further avers that such a scheme violates his rights to equal protection and due process. He claims that there is no rational basis for punishing felony-murderers more severely than premeditated murderers. Petitioner cites a California court's dissent to buttress this contention. See People v. Anderson, 43 Cal.3d 1104, 1147 (1987) (Broussard, J. dissenting) Beyond this case, petitioner cites no authority to support his argument.

The R&R discussed the Supreme Court's ruling in Tison v. Arizona ,481 U.S. 167 (1987). The Court held that the Eighth Amendment does not prohibit the death penalty as being unconstitutionally disproportionate in the case of a defendant whose participate in a felony resulting in murder, even where the defendant's mental state is only one of reckless indifference. Petitioner cites no authority to the contrary. Therefore, petitioner has not stated any basis for relief with regard to the constitutionality of his conviction for first degree murder or his sentence for life without possibility of parole.

V. CONCLUSION

After reviewing the record of the case de novo and taking into consideration the Magistrate Judge's R&R and petitioner's Objections, the court adopts the R&R en toto and DENIES petitioner's Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254.

IT IS SO ORDERED.

DATED: 2/28/98

JUDGE JUDITH N. KEEP
United States District Court
Southern District of California

CC: ALL PARTIES
MAGISTRATE JUDGE